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In many respects, the 1991-1992 Term of the Supreme Court was the term that wasn't. Despite the urgings of the Bush Justice Department and many others, it *wasn't* the Term that the Court expressly overruled *Roe v. Wade*.[1] Despite arguments from many of the same sources, it *wasn't* the Term that the Court overruled *Lemon v. Kurtzman*[2] on church-state separation. Headlines and pundits expressed relief, and some surprise, at the results of many of the Court's decisions.[3]

It is important, however, to look behind the headlines and carefully scrutinize the Court's rulings and their implications. With respect to the First Amendment, for example, the headlines are

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[1] 410 U.S. 113 (1973).

[2] 403 U.S. 602 (1971).

[3] *See, e.g., Justices Decline to Rewrite Church-State Separation Rules*, 20 SCH. LAW NEWS, July 3, 1992, at 1.

correct in proclaiming that well-publicized cases like *Lee v. Weisman*[4] on prayer in schools and *R.A.V. v. St. Paul* [5] on hate speech laws have produced important decisions preserving First Amendment freedoms. But in cases that did not make headlines, the Court eroded free speech protections or came dangerously close to doing so. And even cases like *Weisman* and *R.A.V.* raise troubling questions about the future of First Amendment jurisprudence.

Most of the Court's First Amendment decisions in the 1991-1992 Term concerned freedom of speech. What was most clear in these rulings was the Court's antipathy towards content-based restrictions on expression. Not a single vote was cast on the Court in favor of the "Son of Sam" law struck down in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*[6] or the anti-cross-burning ordinance overruled in *R.A.V.*, even though both provisions had been upheld by the lower courts.

In other rulings concerning free speech, however, the results were mixed. In cases concerning restrictions on expression in public forums and election laws restraining speech, the Court upheld a ban on solicitation in a public airport terminal,[7] sanctioned a prohibition against political speech near polling places on election day,[8] and approved a state law forbidding voters from casting write-in ballots.[9] Decisions protecting First Amendment rights in these contexts were invariably split, often by very narrow margins.[10]

Jurisprudentially, the Court was even more divided, often

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[4] 112 S. Ct. 2649 (1992) (ruling that government-sponsored prayer at public school graduation ceremony in Providence, Rhode Island was unconstitutional).

[5] 112 S. Ct. 2538 (1992) (invalidating St. Paul ordinance prohibiting cross-burning and related "hate-crime" behavior).

[6] 112 S. Ct. 501 (1991) (striking down New York law requiring forfeiture of proceeds of books or other works describing the crime by persons accused or convicted of crime).

[7] International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992).

[8] Burson v. Freeman, 112 S. Ct. 1846 (1992).

[9] Burdick v. Takushi, 112 S. Ct. 2059 (1992).

[10] *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2709 (1992) (5-4 decision invalidating rule forbidding distribution of literature at municipal airport); Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992) (5-4 decision striking down municipal ordinance concerning permit and assembly fees).

with troubling consequences. The Court's unanimity in striking down the St. Paul cross-burning ordinance evaporated as to the proper rationale for the decision, and several justices explained that the majority's rationale threatened to undermine First Amendment protections in the long run.[11] In upholding restrictions on election day political activity near polling places, the Court employed a diluted version of "strict scrutiny" analysis which conflicted with several other decisions this Term and could erode First Amendment safeguards in the future.[12] The majority in *International Soc'y For Krishna Consciousness, Inc. v. Lee* [hereinafter ISKCON] weakened free speech protections in public places through its interpretation of "public forum" doctrine.[13] Concurring and dissenting opinions in several decisions, which did not garner support from a majority, would have weakened such protections even further.[14] While several of the Court's free speech decisions this Term were quite positive and important, and Justice Kennedy in particular demonstrated genuine sensitivity to First Amendment concerns, the overall effect on free speech protections was decidedly mixed.

Justice Kennedy also played an important role in the Court's Establishment Clause decision in *Lee v. Weisman*[15] this Term, writing a five to four opinion for the Court which declined to reconsider *Lemon v. Kurtzman*[16] and which ruled that government-sponsored prayer at public school graduations was unconstitutional. Yet the opinions in *Weisman* and elsewhere suggest that a majority of the Court may well be prepared to limit or overrule *Lemon* in another context.[17] While *Weisman* clearly disappointed those who have sought to weaken church-state separation, the future of Establishment Clause protection remains uncertain.

The remainder of this article will analyze in greater detail

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[11] *See* discussion of *R.A.V.*, *infra* pp. 10-20.

[12] *See infra* pp. 10-20; *see also* discussion of Burson v. Freeman, 112 S. Ct. 1846 (1992) and Norman v. Reed, 112 S. Ct. 698 (1992), *infra* pp. 35-46.

[13] *See* discussion of *ISKCON*, *infra* pp. 24-34.

[14] *See id*; *see also* discussion of Justice Scalia's dissenting opinion in *Norman*, *infra* pp. 38-39.

[15] 112 S. Ct. 2649 (1992).

[16] 403 U.S. 602 (1971). *See infra* note 390.

[17] *See* discussion of *Weisman*, *infra* pp. 56-65.

each of the Supreme Court's nine First Amendment decisions during the 1991-1992 Term. These rulings fall into three categories: free expression, freedom of association, and separation of church and state.

I. Freedom of Speech

A. Content-Based Restrictions on Speech

1. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board

The Supreme Court examined the constitutionality of New York's "Son of Sam" law[18] under the First Amendment in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*[19] That law provided, *inter alia*, that an "entity" contracting with a person "accused or convicted of a crime" for the production of a book or other work describing the crime must turn over to New York's Crime Victims Compensation Board any money owed to that person under the contract.[20] Under the law, the Board was required to deposit the money in an escrow account to be held "for the benefit of and payable to any victim" of a crime by such person, provided that the victim brought a civil tort action and recovered a portion of that money within five years of the date of the establishment of the account.[21] If after five years no actions were pending, the remainder of the funds in the account could be paid over to the accused criminal or his legal representatives.[22]

The law defined "person convicted of a crime" to include, in addition to individuals actually found guilty in court, "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted."[23] This definition

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[18] N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

[19] 112 S. Ct. 501 (1991).

[20] N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

[21] *Id.*

[22] *Id.* § 632-a(4).

[23] *Id.* § 632-a(10)(b).

effectively rendered the statute applicable to any person who had not formally been accused or convicted of a crime, yet who admitted, in a book or other piece of literature, to having committed a crime.[24]

The case arose when the New York State Crime Victims Board learned that Simon & Schuster had signed a contract with organized crime figure Henry Hill and author Nicholas Pileggi for the production and publication of a book about Hill's life and had already paid Hill's literary agent a substantial sum of money on Hill's behalf.[25] The Board notified Simon & Schuster that it had violated Section 632-a of the Son of Sam law by neglecting to deposit the money owed Hill in an escrow account for the victims of Hill's crimes and demanded that both Hill and Simon & Schuster relinquish to it all money already paid to or that would eventually become payable to Hill.[26] In response, Simon & Schuster sued the Board under 42 U.S.C. Section 1983[27] on the grounds that the Son of Sam law violated the First Amendment and sought an injunction prohibiting its enforcement.[28] Both the District Court[29] and the Court of Appeals for the Second Circuit[30] upheld the law as consistent with the First Amendment.

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[24] *Simon & Schuster*, 112 S. Ct. at 505. The New York Court of Appeals had previously ruled that the statute did not cover victimless crimes. *Id.* The court reasoned that a victim was "a necessary requirement for implementation of the statute . . . ." Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 548 (N.Y. 1991), *vacated*, 112 S. Ct. 859 (1992).

[25] *Simon & Schuster*, 112 S. Ct. at 506-07.

[26] *Id.* at 507.

[27] *Id.*

[28] *Id.*

[29] Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989), *aff'd sub nom.* Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *rev'd sub nom.* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1992) (holding that Son of Sam law did not violate First Amendment because it did not directly affect expressive activity and any incidental restriction on expression was no greater than necessary to achieve State's interest in compensating crime victims).

[30] Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *rev'd sub nom.* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1992) (affirming that Son of Sam law did not violate First Amendment because, although statute was content-based restriction on speech, it was narrowly tailored to serve state's strong interest in preventing criminals from profiting from their crimes until their victims were fully compensated for all injuries resulting from their victimization).

The Supreme Court unanimously reversed and found that the Son of Sam law violated the First Amendment.[31] In an opinion written by Justice O'Connor and joined by five other justices,[32] the Court held that the statute imposed a financial burden on speakers because of the content of their speech, something which is "presumptively inconsistent with the First Amendment."[33] The majority noted that regardless of whether the speaker was deemed to be Hill, whose speech about his past crimes would have been deterred by the penalty of lost income, or Simon & Schuster, whose publications would have been limited to books about criminals who were willing to forgo compensation for at least five years, the statute undeniably placed a financial disincentive only on speech of a certain content.[34]

The Court explained that the Son of Sam law was indistinguishable from a tax, such as the one in *Arkansas Writers' Project, Inc. v. Ragland*,[35] which deters speech on the basis of content, in that both act as financial disincentives on speech.[36] Such discriminatory financial treatment is subject to heightened scrutiny under the First Amendment, the Court noted, even when the legislature had no intent to suppress certain ideas when it enacted the statute.[37] The Court also made clear that the law's imposition of a burden on any "entity" contracting with a criminal for the purpose of conveying his speech is just as much of a violation of the First Amendment as a law which imposes such a burden on the media,

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[31] *Simon & Schuster*, 112 S. Ct. at 507-08. Justice Thomas took no part in the opinion. *Id.* at 504.

[32] Justices Blackmun and Kennedy, writing separately, concurred in the judgment. *Id.* at 512.

[33] *Id.* at 508. *See, e.g.*, Leathers v. Medlock, 111 S. Ct. 1438, 1443-44 (1991) (tax which discriminates on the basis of content of taxpayer speech triggers heightened scrutiny under First Amendment); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (sales tax which taxed general interest magazines but exempted newspapers and religious, professional, trade, and sports journals violated First Amendment's freedom of press guarantee because it discriminated on basis of publications' content).

[34] *Simon & Schuster*, 112 S. Ct. at 508.

[35] 481 U.S. 221 (1987).

[36] *Simon & Schuster*, 112 S. Ct. at 508-09.

[37] *Id.* at 509.

since "[t]he Government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker."[38] As a result, the Court determined that for the statute to pass constitutional muster, New York was required to demonstrate that it was necessary to serve a compelling state interest and that it was a narrowly tailored means to that end.[39]

Although the Court conceded that New York had a compelling interest in making certain that crime victims were compensated by those who perpetrated the crimes against them,[40] and that criminals did not obtain financial benefit from their crimes,[41] it held that the State had a minimal interest in limiting crime victim compensation to money earned by criminals through speech about their crimes.[42] The majority emphasized that New York had no greater interest in compensating crime victims from these assets of criminals than from assets obtained through non-speech activities, and that it had no greater interest in suppressing "storytelling"-related speech of criminals than any other such speech.[43] The Court concluded that the Son of Sam law's disparate treatment of storytelling criminal speech was completely unrelated to New York's compelling interest in ensuring that crime victims were compensated from the fruits of the crimes committed against them,[44] and that any interest the State might

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[38] *Id.*

[39] *Id.* *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

[40] *Simon & Schuster*, 112 S. Ct. at 509.

[41] *Id.* at 510.

[42] *Id.*

[43] *Id.*

[44] The Court stated that the New York Crime Victims' Board had used circular reasoning in attempting to justify the Son of Sam law by claiming that the State's interest in upholding the statute was the compensation of crime victims from the profits derived from criminals' storytelling when, in fact, that was merely the statute's effect. *Simon & Schuster*, 112 S. Ct. at 510. For cases where the Court drew similar conclusions, see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 586 (1983) (holding that State's compelling interest in raising revenue through taxation did not justify selective taxation of the press since such interest was altogether unrelated to any distinction between press and nonpress); Carey v. Brown, 447 U.S. 455, 467-69 (1980) (holding that State's compelling interest in preserving privacy by banning residential picketing did not justify selective ban on nonlabor picketing since such interest was completely unrelated to any distinction between labor and nonlabor activities).

have had in imposing such a content-based disincentive on speech was not compelling.[45]

The Court also held that the Son of Sam law did not satisfy the "narrowly-tailored" requirement of the strict scrutiny test.[46] It found the statute to be an overbroad means of assuring that victims are compensated from the fruits of crimes perpetrated against them for two reasons.[47] First, the statute covered literary works on any subject so long as they, in some manner, related to the criminal's description of his crime.[48] Second, the statute's definition of "person convicted of a crime" as including any person who has admitted to committing a crime permitted New York's Crime Victims Board to escrow the income of persons who had never even been prosecuted.[49] Consequently, the statute could have been applied to a wide range of literary works that did not truly allow "criminals" to profit from their crimes while leaving victims uncompensated.[50]

Justice Kennedy concurred in the Court's holding in an expansive opinion in which he argued that it was superfluous to subject the statute to strict scrutiny.[51] He contended that since the statute was clearly content-based, and since the content which the statute regulated was completely protected by the First Amendment, the statute should have been held per se unconstitutional.[52]

Justice Kennedy maintained that the compelling state interest test originated in equal protection analysis and has no application in the realm of content-based regulations which infringe upon free speech.[53] This, he reasoned, is because subjecting content-based

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[45] *Simon & Schuster*, 112 S. Ct. at 510-11.

[46] *Id.* at 512.

[47] *Id.* at 511.

[48] *Id.*

[49] *Id.*

[50] *Simon & Schuster*, 112 S. Ct. at 511. Examples of such works include *The Autobiography of Malcolm X*, which relates crimes committed by Malcolm X before he became a public figure; *Civil Disobedience*, which describes Henry Thoreau's withholding of taxes and his subsequent time in prison; and even the *Confessions of Saint Augustine*, which describes the author's theft of pears from another's vineyard. *Id.*

[51] *Id.* at 512 (Kennedy, J., concurring).

[52] *Id.*

[53] *Id.* at 513 ("[T]he Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment.").

speech restrictions to that test might wrongly imply "that States may censor speech whenever they believe there is a compelling justification for doing so."[54] Supreme Court precedent has demonstrated that the government never has the power to restrict protected expression because of its content, Justice Kennedy maintained.[55] Thus, he concluded, a strict scrutiny analysis of content-based regulations such as the Son of Sam law is not only unnecessary but also unwise.[56]

The Court's decision to strike down the Son of Sam law as incompatible with the First Amendment is consistent with past First Amendment precedent and with the clear hostility of even conservative justices on the Rehnquist Court towards explicit content-based infringements of freedom of expression.[57] As Justice Kennedy's concurrence demonstrated, however, the Court's majority may ironically be weakening First Amendment protection against content regulation in some respects even as it strikes down a content-based statute.[58] By stating that even content-based regulation may be permissible in some circumstances, the majority may unintentionally be inviting future regulation where government believes it has a

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[54] *Id.*

[55] *Id.* at 514. *See, e.g.*, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-30 (1987); Police Dept. of Chicago v. Mosely, 408 U.S. 92, 95 (1972). *See also* Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (content-based discrimination "cannot be tolerated under the First Amendment"). Justice Kennedy also acknowledged that there are, however, a number of categories of expression which traditionally have not received full First Amendment protection and which (at least until the Court's opinion in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992)) could be regulated on the basis of content. *See Simon & Schuster*, 112 S. Ct. at 514 (Kennedy, J., concurring).

[56] *Simon & Schuster*, 112 S. Ct. at 514-15 (Kennedy, J., concurring). Justice Blackmun also filed a concurring opinion which added that the Son of Sam law was underinclusive as well as overinclusive. *Id.* at 512 (Blackmun, J., concurring). He stressed that this was important because of the Court's obligation to provide as much guidance as possible to states with similar statutes. *Id.*

[57] *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404, 2410 (1990) (invalidating federal law prohibiting flag burning) in which Justices Scalia and Kennedy joined; R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (striking down local hate crimes ordinance as facially invalid under First Amendment on grounds that it banned lawful speech on the basis of content) in which Justice Scalia wrote the majority opinion, joined by Justices Kennedy, Souter, and Thomas, and in which Justice O'Connor wrote a concurring opinion.

[58] *Simon & Schuster*, 112 S. Ct. at 515.

sufficiently compelling purpose.

2. R.A.V. v. City of St. Paul

Probably the most controversial free speech decision handed down by the Supreme Court this past term was *R.A.V. v. City of St. Paul.*[59] In a decision that divided civil rights and civil liberties groups across the nation, the Court struck down a Minnesota hate crimes ordinance as facially invalid under the First Amendment.[60] The St. Paul Bias-Motivated Crime Ordinance prohibited the display of any symbol "including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ."[61]

In the early morning of June 21, 1990, petitioner R.A.V. burned a cross on the lawn of a black family's house.[62] He was charged with violation of the hate crimes ordinance and moved to dismiss the charge on the grounds that the ordinance was overbroad and content-based, rendering it facially violative of the First Amendment.[63] The trial court granted petitioner's motion but the Minnesota Supreme Court reversed.[64] The state court explained that, although the ordinance's language was overbroad on its face, the prohibition should be construed under state law to cover only incitement to imminent lawless activity and "fighting words,"[65] categories of expression which have not received protection under the

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[59] 112 S. Ct. 2538 (1992).

[60] *Id.* at 2547.

[61] ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).

[62] *R.A.V.*, 112 S. Ct. at 2541.

[63] *Id.* Petitioner was also charged with violation of MINN. STAT. § 609.2231(4) (Supp. 1990), prohibiting racially motivated assaults, but did not contest that charge. *R.A.V.*, 112 S. Ct. at 2541 n.2.

[64] *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991), *rev'd sub nom.* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

[65] The Minnesota Supreme Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

First Amendment.[66] The Minnesota court also held that the ordinance was narrowly tailored to serve the compelling government interest of "protecting the community against bias-motivated threats to public safety and order."[67]

The Supreme Court unanimously reversed and declared the ordinance unconstitutional.[68] While agreeing on the result, the Court was sharply divided on the rationale. Justice Scalia wrote the majority opinion, joined by four other justices,[69] which declared the ordinance facially unconstitutional on the grounds that it banned lawful speech based on its content.[70] While acknowledging that certain categories of speech, including defamation,[71] obscenity[72] and "fighting words,"[73] may be regulated or prohibited altogether because of their content, the majority maintained that particular types of speech falling within these categories may not, consistent with the First Amendment, be regulated based on content or the viewpoint they express.[74] Even assuming the ordinance was limited to "fighting words," the majority explained, it improperly discriminated based on content because it only prohibited "fighting words" addressed to

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[66] *R.A.V.*, 112 S. Ct. at 2542 (citing *In re* Welfare of R.A.V., 464 N.W.2d at 511).

[67] *R.A.V.*, 112 S. Ct. at 2541-42 (citing *In re* Welfare of R.A.V., 464 N.W.2d at 511).

[68] *R.A.V.*, 112 S. Ct. at 2547.

[69] Justice Scalia's opinion was joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas. *Id.* at 2541.

[70] *Id.* at 2547. The majority struck down the ordinance in spite of its acceptance of the Minnesota Supreme Court's narrowing construction which held that the ordinance covered only "fighting words" as defined by *Chaplinsky* and incitement to imminent lawless action. *Id.*

[71] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that individuals may be compensated for harm inflicted upon them by defamatory falsehood because false statements of fact have no constitutional value); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that public official may recover damages for defamatory falsehood if s/he proves that statement was made with actual malice).

[72] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (holding that a work may be subject to state regulation if it appeals to the prurient interest in sex, portrays in a patently offensive way sexual conduct specifically defined by the applicable state law, and lacks serious literary, artistic, political, or scientific value).

[73] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that "fighting words" may be regulated because they constitute "no essential part of any exposition of ideas").

[74] R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992).

"specified disfavored topics" such as race and religion and did not, for example, forbid "fighting words" used to express hostility based on "political affiliation" or "union membership."[75]

The majority suggested that the ordinance further discriminated against speech on the basis of its viewpoint since, for example, it permitted the use of "fighting words" that did not express hostility on the basis of race or religion by individuals arguing in favor of tolerance and equality, but not "fighting words" by those arguing against those tenets.[76] St. Paul's object of conveying to minority groups its disapproval of speech expressing group hatred, the Court held, did not justify its selective ban on speech on the basis of its content.[77]

The majority acknowledged that there were exceptions or limitations to its rule against content-based regulation of "fighting words" or other traditionally unprotected expression, but held that the St. Paul ordinance did not fall within any of these exceptions.[78] It maintained that the restrictions imposed by the ordinance were not directed at the aspect of the fighting words that rendered them proscribable since fighting words are proscribable because "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey," and the ordinance prohibited fighting words because of the particular idea (of racial, gender, or religious intolerance) that their content communicated.[79] Furthermore, the ordinance could not be saved on the grounds that it was aimed at the "secondary effects" of the speech it proscribed[80] since its intent, and primary effect, was to protect

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[75] *Id.* at 2547.

[76] *Id.* at 2547-48.

[77] *Id.* at 2548.

[78] *Id.*

[79] *R.A.V.*, 112 S. Ct. at 2549. According to the majority, this exception *does* justify, for example, the federal law prohibiting threats of violence against the President, since the reasons why threats are outside the protection of the First Amendment "have special force when applied to the person of the President." *Id.* at 2546.

[80] *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding against First Amendment challenge city ordinance that prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, single or multiple-family dwelling, church, park, or school, on grounds that the city's concern with the secondary effects of adult theaters on the surrounding community is a substantial government

victims of hate crimes from hearing bias-motivated speech.[81] The majority suggested that content-based restrictions may be permissible under circumstances where they do not threaten the suppression of ideas, but held that the ordinance did not qualify for that exception.[82] Finally, the Court held that the ordinance could not be justified on the ground that it was narrowly tailored to serve the compelling state interest of protecting the basic human rights of groups who have historically been subject to discrimination, since an ordinance written more broadly to include groups other than those enumerated by St. Paul would have accomplished the same goal.[83]

Justice White wrote a concurring opinion which Justices Blackmun and O'Connor joined and which Justice Stevens joined in part.[84] Justice White agreed with the majority's judgment but vehemently contested its reasoning.[85] He lambasted the majority for failing to test the St. Paul ordinance under the traditional standards of First Amendment jurisprudence.[86]

Like the majority, Justice White noted that certain categories of speech, including fighting words, may be regulated on the basis of content.[87] However, he argued that these categories of speech are proscribable because they have slight social value[88] and that the Court's protection of fighting words in its holding ignores that well-established doctrine.[89] Unlike the traditional overbreadth doctrine

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interest unrelated to the suppression of free expression which renders the ordinance content-neutral).

[81] *R.A.V.*, 112 S. Ct. at 2549. The impact of expression on its listeners, the majority explained, is not the type of "secondary effect" referred to in *Renton*. *See* Boos v. Barry, 485 U.S. 312, 321 (1988).

[82] *R.A.V.*, 112 S. Ct. at 2549.

[83] *Id.* at 2549-50.

[84] *Id.* at 2550.

[85] *Id.*

[86] *Id.* at 2550-51.

[87] *Id.* at 2551 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[88] *See* Roth v. United States, 354 U.S. 476, 483 (1957) ("the unconditional phrasing of the First Amendment was not intended to protect every utterance").

[89] *R.A.V.*, 112 S. Ct. at 2553-54 (White, J., concurring) (arguing that "[i]t is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment") (citation omitted).

which ensures that protected expression will not be chilled,[90] Justice White charged the Court's new "underbreadth" doctrine encourages expression which is valueless and even harmful by First Amendment standards.[91] Additionally, Justice White contended that the Court's holding failed to distinguish between unprotected speech, which is proscribable on the basis of content because it has *de minimis* social value, and protected speech, which may be restricted only if the government advances a compelling interest and uses narrowly tailored means of regulation.[92]

Justice White also maintained that the majority failed to apply strict scrutiny to the ordinance in *R.A.V.* in a manner consistent with numerous previous holdings,[93] including the Court's recent decision in *Burson v. Freeman.*[94] In *Burson*, the Court upheld a ban on certain political speech near polling places on election day, explicitly rejecting an "underbreadth" attack, and ruling that the ban need not have been enacted in broader, content-neutral terms.[95] This was flatly inconsistent with the majority in *R.A.V.*, Justice White maintained, which held that a law must ban either an entire class of speech or no speech at all.[96]

Justice White also attacked the majority's "ad hoc exceptions" to its "radical revision of First Amendment law."[97] For example, he pointed out that the majority's suggestion that content-based distinctions may be drawn within an unprotected category of speech

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[90] *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985); New York v. Ferber, 458 U.S. 747, 772 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[91] *R.A.V.*, 112 S. Ct. at 2553 (White, J., concurring). Justice White warned that the majority's holding will have a detrimental effect on First Amendment jurisprudence since it will be taken as a message that hate speech has sufficient value to outweigh the social interest in order and morality that has rendered such speech less deserving of First Amendment protection. *Id.*

[92] *Id.* at 2554.

[93] *Id.*

[94] 112 S. Ct. 1846 (1992). *See infra* pp. 40-46.

[95] *R.A.V.*, 112 S. Ct. at 2555 (White, J., concurring) (citing *Burson*, 112 S. Ct. at 1850). *See Burson*, 112 S. Ct. at 1856. ("The First Amendment does not require States to regulate for problems that do not exist.").

[96] *R.A.V.*, 112 S. Ct. at 2555 (White, J., concurring).

[97] *Id.* at 2556.

if the restriction is directed at the very reason that the speech is proscribable is really an "exception that swallows the majority's rule."[98] While this exception makes it proper to ban threats against the President, since "'the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President,'" Justice White explained, precisely the same rationale would apply to the St. Paul ordinance, since "'the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination].'"[99]

Although Justice White clearly suggested that a properly drafted rule banning racially or religiously-based "fighting words" would be constitutional, he concluded that the St. Paul ordinance was improper because it was overbroad.[100] He explained that, while criminalizing some unprotected expression, the ordinance also criminalized a large amount of expression that is protected by the First Amendment.[101] Although Justice White agreed that the Minnesota Supreme Court's narrowing construction of the ordinance must be considered in determining whether the ordinance passes constitutional muster, he determined that the state court included within the definition of "fighting words" any "expression that 'by its very utterance' causes 'anger, alarm or resentment.'"[102] However, Justice White explained, fighting words jurisprudence has consistently affirmed that the mere fact that expression causes offense, injury, or resentment does not render it unprotected.[103] Even as construed by

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[98] *Id.*

[99] *Id.* (quoting majority opinion at 2545-46). Similarly, Justice White maintained, the "secondary effects" exception by the majority was questionable, and any rationale that would make sex harassment a "secondary effect" of speech subject to regulation under Title VII could apply to a St. Paul-type ordinance. *Id.* at 2557.

[100] *Id.* at 2559-60.

[101] *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring).

[102] *Id.* (construing *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991)).

[103] *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring). *See, e.g.*, United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 409, 414 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978) (plurality opinion); Hess v. Indiana, 414 U.S. 105, 107-08 (1973); Cohen v. California, 403 U.S. 15, 20 (1971); Street v. New York, 394 U.S. 576, 592 (1969); Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

the Minnesota high court, therefore, the ordinance was fatally overbroad.[104]

In a separate concurrence joined in part by Justices White and Blackmun, Justice Stevens similarly admonished the Court for revising the categorical approach to First Amendment analysis, and for crafting new and inconsistent exceptions to its new rule.[105] As a result of the majority's holding, Justice Stevens noted, the Court ironically accorded fighting words at least the same protection as political speech and even greater protection than commercial speech, which may be harmful to the First Amendment in the long run.[106]

Justice Stevens went on to explain that, like the majority, he also had reservations about the categorical approach to First Amendment analysis discussed by Justice White in his concurrence.[107] According to Justice Stevens, such analysis failed to recognize that the lines dividing the categories are obscure and constantly changing, and fails to consider the context in which the speech is made, something that has great bearing on the degree of protection it merits.[108] Justice Stevens asserted that First Amendment jurisprudence has established a far broader and more sophisticated approach to analyzing the validity of laws restricting expression and the level of protection accorded certain expression.[109] He stated that a number of factors must be considered in such analysis, including

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[104] *R.A.V.*, 112 S. Ct. at 2559 (White, J., concurring).

[105] *Id.* at 2560 (Stevens, J., concurring).

[106] *Id.* at 2562. This point was made more explicitly by Justice Blackmun in his brief concurrence, in which he charged that by holding that all expressive activity merits the same degree of First Amendment protection, the Court actually reduced the total amount of protection for such activities since the realities are that the Court will never accord some categories of expression, such as child pornography and cigarette advertising, the same level of protection it accords others, such as political speech. Justice Blackmun stated that the case might be regarded as an aberration in First Amendment jurisprudence and have no precedential value since, rather than applying well-established standards of analysis, the Court "manipulated doctrine to strike down an ordinance whose premise it opposed." *Id.* at 2560 (Blackmun, J., concurring).

[107] *R.A.V.*, 112 S. Ct. at 2566 (Stevens, J., concurring).

[108] *Id.* at 2566-67.

[109] *Id.* at 2567.

the content and character of the speech,[110] the context in which the speech is made,[111] the nature of the law restricting the speech,[112] and the scope of the restriction.[113]

Applying his analysis to the St. Paul ordinance, and assuming that the ordinance regulated only fighting words and was not overbroad, Justice Stevens concluded that the ordinance was constitutional.[114] With regard to the content and character of the regulated expression, Justice Stevens contended that the ordinance passed constitutional muster because it regulated only low value speech[115] and "expressive conduct [rather] than . . . the written or spoken word."[116] Concerning the context of the regulated expression,

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[110] *Compare* Meyer v. Grant, 486 U.S. 414, 425 (1988) ("First Amendment protection is 'at its zenith'" when the government regulates political speech or speech on matters of public importance) *with* Pasadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 (1986) ("commercial speech receives a limited form of First Amendment protection"); Young v. American Mini Theatres, 427 U.S. 50, 70 (1976) ("society's interest in protecting [sexually explicit films] is of a wholly different, and lesser, magnitude than [its] interest in untrammeled political debate").

[111] *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) ("[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting . . . [and] must take into account the economic dependence of the employees on their employers").

[112] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) ("[v]iewpoint discrimination is censorship in its purest form"); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

[113] *R.A.V.*, 112 S. Ct. at 2569 (Stevens, J., concurring). *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 748-50 (1978) (emphasizing that scope of ruling which restricted times that offensive words could be broadcast was narrowly limited); Young v. American Mini Theatres, 427 U.S. 50, 71 (1976) (finding significant that "what [was] ultimately at stake [was] nothing more than a limitation on the place where adult films may be exhibited").

[114] *R.A.V.*, 112 S. Ct. at 2567 (Stevens, J., concurring).

[115] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words constitute "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

[116] *R.A.V.*, 112 S. Ct. at 2569 (Stevens, J., concurring) (citing Texas v. Johnson, 491 U.S. 397, 406 (1989)).

Justice Stevens found it noteworthy that the ordinance only regulated fighting words, words which are partially determined by their context since they must be "directed at individuals" and spoken "in confrontational and potentially violent situations."[117] The nature of the St. Paul ordinance further strengthens its validity, Justice Stevens argued, since the ordinance regulated expression on the basis of the harm it produces and not on the basis of subject matter or viewpoint.[118] He contended that the ordinance did not regulate a subcategory of expression which involved discussions concerning race, color, creed, religion, or gender; rather, it regulated only a subcategory of expression that causes harm based on those traits.[119]

Furthermore, Justice Stevens maintained, even if the ordinance regulated fighting words based on their subject matter it would still be constitutional because some subject matter regulations are valid and even necessary in our society and because the ordinance did not go so far as to regulate on the basis of viewpoint, a far greater transgression of the First Amendment.[120] Finally, the St. Paul ordinance, according to Justice Stevens, had a very narrow scope since it only banned a subcategory of an already narrow category of fighting words, thereby permitting a large variety of other expression about race, religious, and gender equality.[121] Thus, Justice Stevens concluded, had the ordinance not been overbroad he would have voted to uphold it as a valid content-based regulation of speech.[122]

In some respects, *R.A.V.* is clearly a victory for the First Amendment. All nine justices agreed that the St. Paul ordinance was unconstitutional, and all nine reinforced the clear message sent by *Simon & Schuster v. Members of the New York State Crime Victims Bd.*[123] that content or viewpoint-based regulation of private speech generally will not pass constitutional muster. Education officials have already commented that *R.A.V.* will probably lead state colleges and

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[117] *R.A.V.*, 112 S. Ct. at 2659 (Stevens, J., concurring).

[118] *Id.* at 2570.

[119] *Id.*

[120] *Id.* at 2570-71. Justice Stevens maintained that the ordinance was not viewpoint-based because it barred *both sides* from using the designated hate speech. *Id.*

[121] *Id.* at 2571.

[122] *Id.*

[123] 112 S. Ct. 501 (1991); *see* discussion of *Simon & Schuster*, *supra* pp. 4-10.

universities to review carefully any codes they have adopted regulating student speech and conduct, and will probably "curtail what limited interest there was . . . in establishing speech codes."[124]

In other respects, however, Justice Scalia's majority opinion in *R.A.V.* raises serious questions for the future of the First Amendment. By effectively striking down the St. Paul ordinance as "underbroad," the majority, in some respects, is calling for regulation of more speech, not less. It is sending a signal to states that if they wish to restrict a certain type of unprotected expression, they must restrict the entire category of expression and not just a subcategory of it. Ironically, this could lead to attempts by government to regulate more speech, not less.

Furthermore, by elevating the First Amendment protection of fighting words to the same level as traditional categories such as political speech, the Court could well erode the protection given free speech across the board. As Justice Blackmun warned, the Court will never afford certain types of speech, such as child pornography and cigarette advertising, the same degree of protection it has previously accorded speech such as political discourse.[125] To the extent that all these forms of speech must be accorded similar protection under *R.A.V.* the result could well be to adopt the lowest common denominator and weaken free speech protections.

Finally, the new theory articulated by the majority,[126] with its exceptions and limitations, is bound to cause confusion and difficulty for the lower courts, as the concurring opinions by Justices White and Stevens illustrate. According greater protection in some respects to fighting words and obscenity than to commercial speech, for example, "turns First Amendment law on its head."[127] As Justice Blackmun commented, *R.A.V.* may well be regarded as *sui generis* and may not have broad implications for First Amendment jurisprudence.[128] At this point, however, the net effect of *R.A.V.* on

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[124] *Supreme Court's "Hate Speech" Ruling May Curb Campus Codes*, 20 SCH. LAW NEWS, July 3, 1992, at 5 (quoting Sheldon Steinbach, General Counsel for the American Council on Education).

[125] *R.A.V.*, 112 S. Ct. at 2560 (Blackmun, J., concurring).

[126] *See supra* pp. 11-13.

[127] *R.A.V.*, 112 S. Ct. at 2564 (Stevens, J., concurring).

[128] *Id.* at 2560-61 (Blackmun, J., concurring).

the future of the First Amendment is uncertain and potentially troubling in some respects.

B. Restrictions on Speech in Public Forums

1. Forsyth County, Georgia v. Nationalist Movement

In *Forsyth County, Georgia v. Nationalist Movement*,[129] the Supreme Court, in a five to four decision, struck down a local ordinance which threatened to restrict speech in public forums.[130] Forsyth County's Ordinance 34[131] authorized the county administrator to issue permits to private individuals wishing to assemble or parade on public property and to charge them a fee commensurate with the administrator's determination of the cost necessary to process the permit applications and to maintain public order at the public gathering.[132] The ordinance set a limit of $1000 per day.[133]

In 1989, an organization called "The Nationalist Movement" applied for a permit to demonstrate on the county courthouse steps in opposition to the federal holiday commemorating Martin Luther King, Jr.'s birthday.[134] Pursuant to Ordinance 34, the county imposed a $100 fee for the permit.[135] The Movement responded by filing suit and requesting an injunction barring Forsyth County from using the ordinance to obstruct the rally.[136]

The District Court denied injunctive relief on the grounds that, although the ordinance gave the county administrator substantial discretion in calculating the fee for each permit applicant, the fee was to be calculated on the basis of content-neutral criteria including the

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[129] 112 S. Ct. 2395 (1992).

[130] *Id.* at 2405.

[131] CUMMING, GA., CITY PARADE AND ASSEMBLY ORDINANCE § 3(6) & (7) (1987).

[132] *Nationalist Movement*, 112 S. Ct. at 2399.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 2400. The fee was not paid and the rally was cancelled. *Id.*

administrative costs of issuing the permit.[137] The Court of Appeals for the Eleventh Circuit reversed the district court, holding that "[a]n ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment," and that a fee of up to $1000 per day was far more than a nominal fee.[138]

In a decision written by Justice Blackmun, the Supreme Court affirmed the holding of the court of appeals, declaring that Ordinance 34 violated the First Amendment on its face.[139] The Court found that the ordinance constituted a prior restraint on speech which did not satisfy the constitutional criteria for government regulation of the uses of public forums.[140] It explained that if the government elects to impose a permit requirement on those wishing to parade or assemble in a public forum, "[i]t may not delegate overly broad licensing discretion to a government official"[141] and that the criteria for obtaining the permit must not be based upon the content of the assemblers' message, must be narrowly tailored to serve a significant government interest, and must leave open alternative channels of communication.[142]

The Court held that Forsyth County's interpretation and implementation of the ordinance manifested that the county lacked "'narrowly drawn, reasonable and definite standards' guiding the

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[137] *Nationalist Movement*, 112 S. Ct. at 2400. The court was troubled by the clause of the ordinance that permitted the costs of maintaining public order to be assessed against demonstrators, but it held that the ordinance, as applied to the Movement, was not an unconstitutional infringement on free expression. *Id.*

[138] Nationalist Movement v. City of Cumming, 913 F.2d 885, 891 (11th Cir. 1990), *aff'd*, 934 F.2d 1482 (11th Cir. 1991) (en banc) (quoting Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986)). The Court of Appeals subsequently vacated the panel's opinion, reheard the case en banc, and issued a per curiam opinion reinstating the entire panel opinion. Nationalist Movement v. City of Cumming, 934 F.2d 1482, 1483 (1991).

[139] Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992). Justices Stevens, O'Connor, Kennedy, and Souter joined in the majority opinion.

[140] *Id.* at 2401.

[141] *Id.* *See* Freedman v. Maryland, 380 U.S. 51, 56 (1965).

[142] *Nationalist Movement*, 112 S. Ct. at 2401 (construing United States v. Grace, 461 U.S. 171, 177 (1983)).

hand of the Forsyth County administrator."[143] It found that the administrator had wide discretion, free from any articulated objective standards, to determine whether and how much to charge permit applicants for police protection, and that this discretion allowed him to assess fees to permit applicants based on his estimation of their viewpoints.[144]

Aside from finding that Ordinance 34 vested excessive discretion in the county administrator, the Court also held it unconstitutional on the ground that it was content-based.[145] The administrator could not possibly calculate how much to charge permit applicants for security unless he considered the content of their message, predicted the response of others to that content, and estimated the quantity of police that would be necessary to contain that response.[146] The public's reaction to the assemblers' message, the Court held, was clearly a content-based criterion for calculating the fee, rendering the ordinance unconstitutional.[147] As the Court recognized, "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile

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[143] *Nationalist Movement*, 112 S. Ct. at 2402-03 (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)). The Court found that the administrator based the fee he charged the Movement on his subjective determination of what would be reasonable. *Nationalist Movement*, 112 S. Ct. at 2403.

[144] *Nationalist Movement*, 112 S. Ct. at 2402-03.

[145] *Id.* at 2403. The sole justification that Forsyth County offered for the ordinance, the need to raise revenue for law enforcement services, was found clearly inadequate to vindicate a content-based fee. *Id.* at 2404.

[146] *Id.* at 2403. The Court also noted that financial disincentives on speech, because its content may offend a hostile audience, are no more constitutional than outright bans on such speech. *Id.* at 2404.

[147] *Id.* *See* Boos v. Barry, 485 U.S. 312, 321 (1988); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988). The Court distinguished Cox v. New York, 312 U.S. 569, 577 (1941) (upholding a state statute which authorized a municipality to charge a parade permit fee of up to $300 for processing costs and "maintenance of public order") on the grounds that no fee was, in fact, assessed in *Cox* and that *Cox* did not authorize the assessment of a permit fee whenever a controversial political message is delivered before a hostile audience. *Nationalist Movement*, 112 S. Ct. at 2404. As the Court explained, even though the Forsyth County ordinance contained much of the same language as the rule in *Cox*, the Court's First Amendment jurisprudence since *Cox* makes clear that it is unconstitutional to effectively charge "a premium in the case of a controversial message delivered before a hostile audience." *Id.*

mob."[148]

Finally, the Court rejected Forsyth County's claim that the $1000 cap on the permit fee would prevent the ordinance from resulting in content-based discrimination.[149] It held that the fee's amount, even if it was nominal, was irrelevant because the ordinance was still unconstitutionally content-based in its linkage of the fee amount to the content of the expression and it provided no procedural safeguards to cure that infirmity.[150]

Chief Justice Rehnquist wrote a dissenting opinion in which Justices White, Scalia, and Thomas joined.[151] Justice Rehnquist claimed that the case was governed by *Cox v. New Hampshire*,[152] where a state statute authorizing a municipality to assess a parade permit fee of up to $300 to meet the administrative costs of processing the permit applications and maintaining public order at the licensed activity was upheld.[153] Although acknowledging that *Cox* had been more narrowly interpreted to permit only nominal charges, the dissent construed *Cox* as "expressly recogniz[ing] that the New Hampshire state statute allowed a city to levy much more than a nominal parade fee . . . ."[154] The dissent further argued that the

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[148] *Nationalist Movement*, 112 S. Ct. at 2404 (footnote omitted). *See* Gooding v. Wilson, 405 U.S. 518 (1972).

[149] *Nationalist Movement*, 112 S. Ct. at 2405.

[150] The Court stated that the Court of Appeals had incorrectly suggested, based on its reading of *Murdock v. Pennsylvania*, that a nominal fee would have been valid. *Id.* *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down a municipal ordinance which authorized assessment of a flat licensing tax on the distribution of religious literature as infringing the First Amendment right of religious expression). While distinguishing the fee upheld in *Cox*, the *Murdock* Court had noted that the fee imposed in its case was not nominal, and the Court of Appeals had understood that to mean that nominal fees were constitutional. *Id.* at 116. As the majority explained in *Nationalist Movement*, the *Murdock* Court was simply distinguishing the facts there from those in *Cox*, and the nominal size of a fee does not necessarily make it proper. *Nationalist Movement*, 112 S. Ct. at 2405.

[151] *Nationalist Movement*, 112 S. Ct. at 2405 (Rehnquist, J., dissenting).

[152] 312 U.S. 569 (1941).

[153] *Nationalist Movement*, 112 S. Ct. at 2406 (discussing Cox v. New Hampshire, 312 U.S. 569, 577 (1941)).

[154] *Nationalist Movement*, 112 S. Ct. at 2406 (construing and quoting *Cox*, 312 U.S. at 576). In particular, Justice Rehnquist claimed that *Murdock* had mischaracterized the *Cox* statute by implying, while distinguishing the case, that the fee it sanctioned was merely nominal. *Nationalist Movement*, 112 S. Ct. at 2406.

Court's concern that the county would assess fees on the basis of approval or disapproval of permit applicants' messages or possible hostile audiences was unfounded since, Justice Rehnquist explained, neither the county nor any lower court had ever construed the ordinance as vesting the county administrator with unchecked discretion and the lower courts had never found that the county intended to do that or had ever done so before.[155]

The opinion in *Nationalist Movement* represents an important reaffirmation of the principle recognized in *Murdock v. Pennsylvania*: "[F]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."[156] In fact, as the majority suggested, a contrary ruling would have allowed a municipality to seriously limit the ability of controversial speakers to express their views in public by requiring them to pay police protection and related costs due to potentially unreceptive or hostile audiences. While the ordinance in *Nationalist Movement* would primarily impact on those who could not afford to pay a $1000 fee, the rationale of the dissent could permit even much larger fees, effectively making difficult or impossible public expression by many controversial groups. The fact that the Court was only one vote away from such a result in *Nationalist Movement* is potentially disturbing for the future of First Amendment jurisprudence.

2. *International Society for Krishna Consciousness, Inc. v. Lee*

Another important case decided this term concerning restrictions on speech in public forums was *International Society for*

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[155] *Nationalist Movement*, 112 S. Ct. at 2406. Justice Rehnquist stated that resolution of the issue of whether the ordinance did vest the county administrator with too much discretion was best left to the district court. *Id.* at 2407. *See* Ward v. Rock Against Racism, 491 U.S. 781, 795 (1989) (holding that city's narrowing construction of whether municipal noise regulation vests too much discretion in city officials charged with enforcing it must be considered in determining whether regulation violates First Amendment). As the majority pointed out, however, the defenders of the ordinance had consistently taken the position that it permitted increased fees to be charged for the cost of police protection from hostile crowds, making a remand unnecessary on this fundamental point. *Nationalist Movement*, 112 S. Ct. at 2404 n.12.

[156] Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

Krishna Consciousness, Inc. v. Lee [hereinafter *ISKCON*].[157] The issues in *ISKCON* were whether a government-operated airport terminal constituted a public forum for First Amendment purposes and whether a regulation prohibiting solicitation of funds and distribution or sale of written materials in the terminal violated the First Amendment.[158]

The Port Authority of New York and New Jersey, which owns and operates three large airports in the New York metropolitan area, adopted a regulation prohibiting, among other things, repetitive "solicitation and receipt of funds" and distribution or sale of literature within its airport terminals, permitting such solicitation and distribution only on the sidewalks outside the airport terminals.[159] The International Society for Krishna Consciousness, a nonprofit religious organization whose members distribute religious literature and solicit funds in public places to support their religion, sued for declaratory and injunctive relief under 42 U.S.C. Section 1983 on the grounds that the regulation deprived them of their First Amendment rights.[160]

The district court determined that the airport terminals were public forums since they were analogous to public streets, the archetypal public forums.[161] It then applied strict scrutiny, concluded that the regulation was not narrowly tailored to support a compelling state interest, and granted petitioner's motion for summary judgment.[162] The court of appeals affirmed in part and reversed in part, holding that, in light of *United States v. Kokinda*,[163] the airport terminals were not public forums.[164] It thus subjected the regulation to a lower level of scrutiny and found that the ban on solicitation was

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[157] 112 S. Ct. 2701 (1992).

[158] *Id.* at 2703.

[159] *Id.* at 2704.

[160] *Id.* at 2703, 2704.

[161] International Soc'y for Krishna Consciousness, Inc. v. Lee, 721 F. Supp. 572, 577 (S.D.N.Y. 1989), *aff'd in part and rev'd in part*, 925 F.2d 576 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2709 (1992) (per curiam).

[162] *International Soc'y for Krishna Consciousness, Inc.*, 721 F. Supp. at 579.

[163] 110 S. Ct. 3115 (1990) (plurality opinion) (holding that postal sidewalk constituted government property that was not traditional or designated public forum).

[164] International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 581-82 (2d Cir. 1991) *aff'd*, 112 S. Ct. 2709 (1992) (per curiam).

reasonable while the ban on distribution was not.[165] Both sides successfully petitioned the Supreme Court for certiorari.[166]

In a series of opinions, the Court in effect affirmed the ruling of the Court of Appeals. Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter agreed in a *per curiam* opinion that the ban on sale and distribution of literature was unconstitutional.[167] Justice O'Connor, however, joined Justices White, Scalia, and Thomas in an opinion by Chief Justice Rehnquist, which found that the airport was not a public forum and that the ban on solicitation was proper.[168] Justice Kennedy concurred, concluding that the solicitation ban was proper even though the airport should be considered a public forum.[169]

Chief Justice Rehnquist's opinion affirming the solicitation ban acknowledged that solicitation is protected speech under the First Amendment.[170] Nevertheless, Chief Justice Rehnquist's opinion stated, the government is not required to permit all types of speech on its property.[171] Applying the "forum-based" approach for analyzing government regulation of the use of its property for First Amendment activities,[172] the Court concluded that airport terminals

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[165] *International Soc'y for Krishna Consciousness, Inc.*, 925 F.2d. at 582.

[166] *ISKCON*, 112 S. Ct. at 2704.

[167] *Id.* at 2710.

[168] *Id.* at 2709.

[169] *Id.* at 2715.

[170] *Id.* *See also* United States v. Kokinda, 110 S. Ct. 3115, 3118 (1990) (citing Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 629 (1980)); Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781, 788-89 (1988); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[171] *ISKCON*, 112 S. Ct. at 2705. When the government acts as proprietor rather than lawmaker, it has greater discretion to prohibit expression on its property. *Id.* (citing *Kokinda*, 110 S. Ct. at 3119 (citing Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896 (1961))). *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (upholding school district limitation on access to internal mail system used by district to communicate with teachers and employees); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding ban on political advertisements in city-operated transit vehicles).

[172] Under the "forum-based" approach, regulation of expression on public property that has traditionally been open to the public for expressive activity ("traditional public forums") or that has been designated by the government for such activity ("designated public forums") is subject to strict scrutiny and may only be justified by a narrowly tailored compelling state interest. Regulation of expression on any other form of

are nonpublic forums and that the Port Authority's regulation, therefore, was required to be subjected only to a "reasonableness" standard of review.[173]

The majority reasoned that airport terminals are not traditional public forums because airports have only recently achieved their vast size and commercial nature and, thus, cannot be said to have "'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity."[174] It further stated that airport terminals are not designated public forums because, not only have terminal operators never intentionally opened them up for expressive activity, but they have frequently objected to such use.[175] The majority emphasized that the principal function of airports is facilitation of efficient air travel, not promotion of free expression.[176]

Having concluded that airport terminals are nonpublic forums, the majority explained, the Port Authority regulation "need only satisfy a requirement of reasonableness."[177] Without explaining specifically what that requirement means, the majority ruled that the solicitation ban clearly satisfied it.[178] The majority maintained that solicitation often has a disruptive effect on business because it requires potential customers to stop, decide whether to contribute, and then search for money, impeding the flow of traffic in airports and creating delays which may cause travellers to miss their flights.[179] Furthermore, the majority suggested, solicitation may cause duress if it is aimed at vulnerable travellers, and solicitors may commit fraud

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government property must only be reasonable and viewpoint-neutral. *ISKCON*, 112 S. Ct. at 2705 (citing Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

[173] *ISKCON*, 112 S. Ct. at 2706.

[174] *Id.* (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (holding, for the first time, that streets and parks are traditional public forums and may be freely used by the public for expressive activity)).

[175] *ISKCON*, 112 S. Ct. at 2706-07. The majority further rejected the claim that "transportation nodes" such as airports and rail stations have historically been open for speech activity, noting that many such "nodes" are private and that regardless of the proper conclusion with respect to other transportation centers, the history of airports reinforces the conclusion that they are not public forums. *Id.*

[176] *Id.* at 2707.

[177] *Id.* at 2708.

[178] *Id.*

[179] *Id.* (citing United States v. Kokinda, 110 S. Ct. 3115, 3123 (1990)).

by concealing their true identity or by shortchanging contributors.[180] These concerns are enhanced by the fact that travellers are often on a tight schedule and, thus, probably will not take the time to complain to airport authorities.[181] Particularly since the Port Authority did not completely restrict solicitation on its airport premises, since it permitted solicitation activities on the sidewalks outside airport terminals where the majority of air travellers pass, the majority concluded that the Port Authority's limitation of solicitation was reasonable in light of its interest in preventing airport congestion and maintaining efficient air travel.[182]

In a concurring opinion, Justice O'Connor agreed with the Court that airport terminals are not public forums.[183] She went on to explain, however, that the reasonableness requirement for restrictions in non-public government forums is nevertheless a meaningful protection of free speech, and requires that restrictions must truly be reasonable and not an intentional suppression of the speaker's viewpoint.[184] Justice O'Connor stated that whether a government's regulation of speech in a nonpublic forum is reasonable must be determined by examining the forum's essential function and nature.[185] To be reasonable, a restriction on expression in a nonpublic forum must serve the government's interest in maintaining the property for its designated purpose.[186] While this issue can be easily resolved in many cases since most forums are dedicated to only one purpose, she explained, airports are used for a number of activities, none of which are any more related to the facilitation of air travel than are

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[180] *ISKCON*, 112 S. Ct. at 2708.

[181] *Id.*

[182] *Id.* at 2708-09.

[183] *Id.* at 2711 (O'Connor, J., concurring).

[184] *Id.* at 2713. *See* Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (invalidating a regulation that banned "all First Amendment activities" in the Los Angeles International Airport without even determining whether airports were public forums).

[185] *ISKCON*, 112 S. Ct. at 2712. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 809 (1985); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1981).

[186] *ISKCON*, 112 S. Ct. at 2712 (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129-30 (1981)).

ISKCON's solicitation and distribution activities.[187] Thus, Justice O'Connor averred, the relevant inquiry is whether the Port Authority regulation is reasonably related to maintaining the airport's multipurpose tenor, not to promoting efficient air travel.[188]

Justice O'Connor concurred with the Court's judgment that the Port Authority's regulation of solicitation was reasonable, explaining that by the nature of solicitation as an activity, it interfered with the airports' functioning.[189] Unlike the ban on solicitation, however, Justice O'Connor stated that the ban on distribution was unreasonable and invalid.[190] She distinguished distribution on the grounds that it did not require the recipient of the literature to stop and ponder the contents of a leaflet and, thus, did not impede the functioning of the airport as a multipurpose forum.[191]

Justice Kennedy also wrote a concurring opinion, part of which Justices Blackmun, Stevens, and Souter joined.[192] Justice Kennedy agreed with the Court's judgment, but disagreed with its holding that airport terminals are not public forums.[193] He explained that the Court's determination that terminals are not public forums effectively allows the government unlimited discretion to restrict expression on its property by simply articulating a nonspeech-related purpose for the forum, and inhibits the creation of new public forums.[194] He stated that a determination of whether property

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[187] *ISKCON*, 112 S. Ct. at 2713.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.* Justice O'Connor noted that the only possible justification for prohibiting leafletting was the avoidance of littering, but she discounted this as inadequate to sustain the ban. *Id.* at 2714. Justice O'Connor also distinguished the case of Greer v. Spock, 424 U.S. 828 (1976), where the Court upheld a regulation banning the distribution of literature on a military base, another multipurpose forum, without the approval of the base commander. *ISKCON*, 112 S. Ct. at 2714. She argued that since the commander in *Greer* could only disapprove those publications that he found constituted "'a clear danger to [military] loyalty, discipline, or morale,'" the regulation in that case was reasonable, whereas the prohibition on leafletting was absolute and not justified by any reasons independent of those justifying the ban on solicitation. *Id.* at 2714 (quoting *Greer*, 424 U.S. at 840).

[192] *ISKCON*, 112 S. Ct. at 2715 (Kennedy, J., concurring).

[193] *Id.*

[194] *Id.* at 2716.

constitutes a public forum must be based, not on the government's pronounced purpose for the property nor on its express designation of the property for expressive activity, but on "the actual physical characteristics and uses of the property."[195]

Justice Kennedy attacked the majority for basing its reasoning on a fallacious view of precedent and history. He contended that the principal purpose of most traditional public forums is not necessarily public discourse; for example, the principal purpose of streets and sidewalks, quintessential public forums, is to facilitate transportation, like airports, not to promote public discourse.[196] Particularly in this modern age, a government-owned airport is one of the few public places where many members of the public have contact with each other and which is suitable for public discourse, analogous to streets and sidewalks.[197]

To ascertain whether public property's physical characteristics and uses render it a public forum, Justice Kennedy maintained, courts should consider:

> [W]hether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has, as a factual matter, dedicated the property.[198]

In answering the question, he suggested, courts should look at "the consistency of those uses with expressive activities in general, rather than the specific sort of speech at issue in the case before it" and "the availability of reasonable time, place, and manner restrictions . . ."[199]

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[195] *Id.* Justice Kennedy maintained that the purpose of the First Amendment is to limit government power and that the Court's holding that the classification of property depends on the government's definition of it conflicts with this objective. *Id.*

[196] *Id.* at 2717.

[197] *Id.*

[198] *ISKCON*, 112 S. Ct. at 2718 (Kennedy, J., concurring).

[199] *Id.*

Applying these principles to the Port Authority's airport terminals, Justice Kennedy concluded that the terminals were public forums.[200] He pointed out that the District Court had found that the airports, like public streets, were large public thoroughfares full of people, stores, and commercial activities.[201] Justice Kennedy also noted that the general public had unlimited access to the Port Authority airports, making it all the more important to safeguard free expression rights in them.[202] Finally, Justice Kennedy maintained that there was no reason to believe that any interference with the efficient operation of the airports could not be alleviated with reasonable time, place, and manner restrictions on expression within them.[203]

After concluding that the airport terminals were public forums, Justice Kennedy strictly scrutinized the Port Authority regulation and found that the provision prohibiting leafletting within the airport terminals was fatally overbroad.[204] He explained that the provision was not narrowly tailored to serve the Port Authority's interest in maintaining efficient operation of its airports since the same goal could be accomplished through narrow regulation of the time and place of the leaflet distribution and that it did not leave open alternative channels for communication.[205]

Nonetheless, Justice Kennedy found that the provision of the Port Authority regulation prohibiting "solicitation and receipt of funds" should be upheld as either a reasonable time, place, and manner restriction or as a regulation directed at the nonspeech component of expressive conduct.[206] While conceding that solicitation is protected by the First Amendment, Justice Kennedy argued that the Port Authority's regulation was valid in that it was narrowly drafted to prohibit only repetitive in-person solicitation for the immediate

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[200] *Id.* at 2719.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *ISKCON*, 112 S. Ct. at 2720 (Kennedy, J., concurring).

[205] *Id.* Justice Kennedy noted that the leafletting provision of the regulation was so broad that Justice O'Connor found it invalid even under the reasonableness test applicable to nonpublic forum analysis. *Id.*

[206] *Id.* Justices Blackmun, Stevens, and Souter did not join in this part of Justice Kennedy's opinion.

payment of money.[207] As such, it permitted solicitation of funds, but merely limited the manner in which that solicitation could be accomplished.[208] Justice Kennedy claimed that such regulation of solicitation served a significant government interest since in-person solicitation for immediate receipt of funds creates a risk of fraud and duress because the solicitee lacks time for reflection before deciding whether to make a contribution.[209] Furthermore, he noted that the rule was content-neutral since its purpose was unrelated to the content of the speech or the identity of the speaker.[210] Finally, Justice Kennedy contended that the regulation left open alternative channels of communication since it permitted all solicitation which did not request immediate payment of funds such as distributing pre-addressed envelopes for solicitees to later use to mail in their donations.[211]

Justice Souter wrote an opinion, joined by Justices Blackmun and Stevens, agreeing that the distribution provision of the Port Authority's regulation should be invalidated, but dissenting from the holding that the solicitation provision should be upheld.[212] Justice Souter agreed with Justice Kennedy concerning the proper designation of airports as public forums, but maintained that the solicitation ban failed to pass the strict scrutiny test because it was not narrowly tailored to serve a significant government interest and did not leave open alternative channels of communication.[213]

Justice Souter explained that the regulation was not narrowly tailored to advance the government interest in preventing coercion

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[207] *Id.* at 2720-21. Justice Kennedy claimed that for a law to be narrowly tailored, it need not be the *least* restrictive or intrusive means of achieving the government's goal. *Id.*

[208] *Id.* at 2721.

[209] *ISKCON*, 112 S. Ct. at 2722 (Kennedy, J., concurring).

[210] *Id.* at 2722.

[211] *Id.* at 2722-23. Justice Kennedy distinguished the solicitation ban from the ban on sale of literature, claiming that the danger of fraud was less with respect to sale of materials seen by a customer, that a ban on sales which is less narrowly tailored would leave open fewer alternative channels for communication, and that a ban on sales would discriminate against those who could not afford to distribute their materials free of charge. *Id.*

[212] *Id.* at 2724-25 (Souter, J., concurring in part and dissenting in part).

[213] *Id.*

since a potential customer could easily walk away from an insistent solicitor.[214] Nor could the regulation be sustained on the grounds that it prevented fraudulent conduct, he maintained, since there was almost no evidence that ISKCON was perpetrating any fraud and since there had been no claims of fraud in the Port Authority since 1981.[215] Even if the ban on solicitation advanced a significant government interest, he stated, it would still fail because the government could advance its interests in preventing coercion and fraud by more narrowly tailored and less intrusive means.[216] Finally, Justice Souter contended that the solicitation ban was invalid for failing to leave open alternative channels of communication since the ban effectively prohibited poorly funded groups from receiving donations from solicitation.[217]

In contrast, Chief Justice Rehnquist wrote an opinion, joined by Justices White, Scalia, and Thomas, arguing that the ban on leafletting should have been upheld along with the ban on solicitation.[218] The Chief Justice maintained that leafletting presented similar problems of airport congestion and delay as solicitation.[219] Furthermore, he argued, many who accept literature later drop it on the floor, creating not only a safety hazard, but also creating more

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[214] *Id. See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982) (holding, in reference to black boycott of white stores, that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action").

[215] *ISKCON*, 112 S. Ct. at 2726 (Souter, J., concurring in part and dissenting in part). More than intent to prevent fraud is necessary to sustain a ban on speech. *Id. See, e.g.*, Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) ("[t]he Village, consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing on the streets and house to house.").

[216] *ISKCON*, 112 S. Ct. at 2726 (Souter, J., concurring in part and dissenting in part). *See, e.g.*, *Schaumberg*, 444 U.S. at 637-38 (striking down ban on solicitation on grounds that Village could advance its interest in preventing fraud by less intrusive means); Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781 (1988) (holding that state must use more narrowly tailored means to cure its fraud problem than compelling disclosure by professional fundraisers of amount of funds turned over to charity in previous year).

[217] *ISKCON*, 112 S. Ct. at 2727 (Souter, J., concurring in part and dissenting in part).

[218] Lee v. International Soc'y for Krishna Consciousness, Inc., 112 S. Ct. 2709, 2710 (1992) (Rehnquist, J., dissenting).

[219] *Id.* at 2710.

work for the airport staff who must later clean its floors.[220] To the extent that prohibiting solicitation was reasonable, the dissent urged, so was forbidding distribution.[221]

Several aspects of the *ISKCON* decision have troubling implications for First Amendment doctrine. By holding that a government-owned large metropolitan airport terminal is not a public forum, the majority threatens the structure and flexibility of public forum analysis. The majority opinion suggests that, aside from streets, sidewalks, and parks, nothing may be a public forum unless the government says it is.[222] Particularly as streets and sidewalks are used less and nontraditional public gathering places are used more, the result may be to give the government enormous authority to limit the scope of the First Amendment.

Furthermore, by holding that airport terminals are nonpublic forums and that solicitation within them is proscribable,[223] the Court undermined the principle that solicitation is fully protected by the First Amendment and created a double standard of First Amendment protection harming new or indigent groups whose very survival may depend upon collecting funds as they distribute their literature. Such discriminatory treatment of groups raises equal protection concerns and makes the case all the more problematic.

Finally, it is important to note that the Court came within one vote in *ISKCON* of banning even distribution of free literature in a government-owned, public gathering place. With a majority of the Court on record in favor of severely constricting the scope of public forum doctrine, the only protection left for free expression in many public places may be the doctrine that restrictions on speech in such places should at least be "reasonable." Future decisions will reveal how secure -- or insecure -- that protection will be.

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[220] *Id.*

[221] *Id.*

[222] *ISKCON*, 112 S. Ct. at 2706.

[223] *Id.*

C. *Election Laws Limiting First Amendment Activity*

1. *Norman v. Reed*

The Supreme Court considered three cases this term in which election laws allegedly interfered with the First Amendment freedom of speech. The first, *Norman v. Reed*,[224] concerned the constitutionality of Illinois ballot access rules. In *Norman*, petitioners were candidates for public office who attempted to establish throughout Cook County the Harold Washington Party (HWP), a political party previously established in Chicago, which is located in Cook County.[225] In order to field candidates for statewide elections, Illinois law generally required new party organizers to obtain 25,000 nominating signatures.[226] The HWP candidates submitted nominating petitions to run for county-wide elections, elections within the city, and elections limited to contests within the suburbs.[227]

The HWP petitioners had 44,000 nominating signatures in Chicago but only 7800 signatures in the suburbs.[228] A number of voters petitioned the County Electoral Board and objected to petitioners' use of the HWP name.[229] They also claimed that since petitioners had failed to obtain 25,000 signatures in each of the two electoral districts within Cook County (Chicago and the suburbs), Illinois law directed the disqualification of petitioners' entire slate of candidates.[230]

The Electoral Board rejected the objection to the use of the HWP name, but disqualified petitioners' candidates from running for suburban offices.[231] The Cook County Circuit Court affirmed the ruling on the use of the HWP name, but held that state law prohibited the petitioners from running any candidates in Cook County and

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[224] 112 S. Ct. 698 (1992).

[225] *Id.* at 700.

[226] ILL. REV. STAT. ch. 46, § 10-2 (1989).

[227] *Norman*, 112 S. Ct. at 703.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Norman*, 112 S. Ct. at 704.

subsequently struck the entire slate of candidates.[232] The Illinois Supreme Court banned petitioners' use of the HWP name and affirmed the Circuit Court's ruling preventing petitioners from fielding any candidates in the Cook County elections.[233]

In a seven to one decision,[234] the Supreme Court reversed in part and affirmed in part the Illinois Supreme Court, holding that a complete ban on petitioners' use of the HWP name and the disqualification of their candidates from running in any county elections was unconstitutional.[235] Justice Souter wrote the opinion of the Court, noting that the right of citizens to create and develop political parties was a constitutional right stemming from the First and Fourteenth Amendments.[236] The Court required that "any severe restriction . . . be narrowly drawn to advance a state interest of compelling importance."[237] In *Norman*, the Court concluded that the Illinois Supreme Court's "draconian" construction of Illinois law,

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[232] *Id.*

[233] *Id.*

[234] Justice Thomas took no part in the consideration or decision of the case. *Id.* at 699.

[235] *Id.* at 706. The Supreme Court had earlier granted a stay from the Illinois Supreme Court decision, essentially reinstating the opinion of the Electoral Board and thereby permitting petitioners to run under the HWP name in the Cook County election. Norman v. Reed, 111 S. Ct. 333 (1990) (mem.). None of the HWP candidates were elected but a number of them received over five percent of the vote and therefore will qualify in all or part of Cook County in the next election as an "established political party." *Norman*, 112 S. Ct. at 704. The Court rejected the argument that since the election was over the controversy was moot, stating that "[e]ven if the issue before us were limited to petitioners' eligibility to use the Party name on the 1990 ballot, that issue would be worthy of resolution as 'capable of repetition, yet evading review.'" *Id.* at 704-05 (quoting Moore v. Ogilvie, 394 U.S. 814, 816 (1969)).

[236] *Norman*, 112 S. Ct. at 705. *See* Anderson v. Celebrezze, 460 U.S. 780, 793-94 (1983) (invalidating Ohio's early filing deadline for independent candidates for office of President as unconstitutional burden on voting and association rights of supporters and independent candidates); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (striking down as unconstitutional Illinois statute requiring nominating petitions for new political parties seeking office serving less than the entire state to contain more than 25,000 signatures); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (holding that an Ohio election law, making it impossible for a new party to be placed on state ballot to choose electors pledged to particular candidates, violated Equal Protection Clause).

[237] *Norman*, 112 S. Ct. at 705 (citing *Socialist Workers Party*, 440 U.S. at 184, 186).

which essentially prohibited new candidates running in one political subdivision from ever using the name of a political party established in another, was unnecessary to further the States' asserted interests in preventing misrepresentation and electoral confusion.[238] Such a construction, the Court reasoned, would unnecessarily frustrate the development of small parties.[239]

The Court also reversed the Illinois Supreme Court's ruling that petitioners' failure to obtain 25,000 signatures from the suburbs disqualified the entire slate of candidates running under the HWP name.[240] Although Illinois law required petitioners to obtain 25,000 signatures in each district, the Court held that disqualifying the entire slate of candidates was not the least restrictive means of furthering the State's interest in limiting the ballot to parties who have demonstrated public support.[241]

In reaching its conclusion, the Court relied on *Illinois Bd. of Elections v. Socialist Workers's Party*,[242] in which the Court struck down an Illinois ballot-access scheme that required party organizers to obtain more nominating signatures to field candidates in local elections than in state-wide contests.[243] As the Court noted, the Illinois Supreme Court's construction of the law in *Norman* effectively required petitioners to obtain 50,000 signatures to run any candidates in Cook County.[244] As a result, based on its holding in *Socialist Worker's Party*, the Court concluded that the Illinois Supreme Court's interpretation of the law was not the least restrictive means of furthering the State's interest and was therefore unconstitutional.[245]

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[238] *Norman*, 112 S. Ct. at 706.

[239] *Id.* As the Court suggested, the State could simply request candidates to get formal permission before using an established party's name in order to further its interests. *Id.*

[240] *Id.* at 707.

[241] *Id.*

[242] 440 U.S. 173 (1979).

[243] *Norman*, 112 S. Ct. at 707.

[244] *Id.*

[245] *Id.* As the Court explained, Illinois could have advanced its interest by requiring a minimum number of signatures in each district, fixing the total no higher than 25,000. *Id.* at 708. Additionally, the Court pointed out that there was no distribution of support requirement for statewide elections and stated that "it requires elusive logic to

Although the Supreme Court reversed the Illinois Supreme Court's other holdings in *Norman*, the Court upheld the ruling which barred them from running in suburban-only races.[246] Petitioners contended that since they had acquired 25,000 signatures in the city district, that should qualify them to field candidates in all of Cook County.[247] The Court held that the Illinois ballot access requirement of 25,000 nominating signatures from each electoral district did not unduly burden petitioners' right to run for positions in the city district under the HWP name.[248] "Just as the State may not cite the Party's failure in the suburbs as reason for disqualifying its candidates in urban Cook County," the Court stated, "neither may the Party cite its success in the city district as a sufficient condition for running candidates in the suburbs."[249]

Justice Scalia wrote a dissenting opinion in *Norman* in which he argued that *Norman* and *Socialist Workers* involved substantially different fact patterns and therefore the Court's reliance on *Socialist Workers* was misplaced.[250] Justice Scalia maintained that the "sort of" heightened signature minimum in *Norman* was the indirect result of the requirement that a new party run a "complete slate," i.e., a candidate in each of the subdivision districts.[251] As a result of the complete slate requirement, no one could run as a new party candidate in any district unless that new party's candidates in other districts also received 25,000 signatures.[252] *Socialist Workers Party*, Justice Scalia noted, involved a single election for an at large position

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demonstrate a serious state interest in demanding such a distribution for new local parties." *Id.*

[246] *Id.* at 707-08.

[247] *Norman*, 112 S. Ct. at 708.

[248] *Id.*

[249] *Id.* The Supreme Court declined to consider and remanded for determination one other issue in the case. The HWP party did not field candidates for any elected judicial offices in Cook County. The Circuit Court held that this was a failure to fulfill the Illinois complete-slate requirement and invalidated the party's slate of candidates on that basis. The Court declined to consider the issue because the Illinois Supreme Court did not address it. *Id.* at 708-09.

[250] *Norman*, 112 S. Ct. at 710 (Scalia, J., dissenting).

[251] *Id.*

[252] *Id.*

and therefore was not dispositive of the facts in *Norman*.[253] Furthermore, Justice Scalia asserted that the "complete slate requirement" advanced the State's legitimate interest in ensuring that candidates have serious support in each election.[254] Absent a legitimate constitutional challenge to the complete slate requirement, Justice Scalia concluded, there was no reason to deny the State the right to demand that new party candidates acquire 25,000 signatures from each district within a political subdivision.[255]

The Court's reasoning and result in *Norman* is particularly interesting when contrasted with *Burson v. Freeman*.[256] In *Norman*, the Court reasoned that the Illinois Supreme Court's construction of state law would unduly burden any political party lacking the resources to run a statewide campaign.[257] In *Burson*, the plurality upheld Tennessee's campaign-free zone, a law that the dissent in *Burson* noted would have a grave impact on candidates with fewer resources, candidates for lower visibility offices, and "grassroots" candidates.[258] The plurality in *Burson* refused to require that Tennessee further its interests in protecting voters from intimidation and fraud by less restrictive means.[259] The Court in *Norman*, however, mandated that Illinois achieve its interest in ways that would have the least impact on the First Amendment rights of political organizers.[260] In a time when citizens seem particularly troubled by the political system, it is unfortunate that the Court has been inconsistent in its protection of the First Amendment freedoms of those who seek to participate in the political process.

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[253] *Id.*

[254] *Id.*

[255] *Id.* at 711.

[256] 112 S. Ct. 1846 (1992), discussed *infra* pp. 40-46.

[257] *Norman*, 112 S. Ct. at 706.

[258] *Burson*, 112 S. Ct. at 1864 (Stevens, J., dissenting).

[259] *Id.*

[260] *See Norman*, 112 S. Ct. at 707-08.

2. *Burson v. Freeman*

Burson v. Freeman[261] was the second case in which the Supreme Court considered election laws arguably infringing on speech. In *Burson*, the Court upheld Section 2-7-111(b) of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign posters, signs, or other materials, within 100 feet of any polling place.[262] Applying strict scrutiny, the Tennessee Supreme Court struck down the provision on the grounds that although the State had a compelling interest in banning the solicitation and distribution of campaign materials inside the polling place, it had no compelling interest in regulating the premises outside the polling place.[263] As a result, the state court ruled that the means chosen to protect the State's interest were neither narrowly tailored nor the least restrictive means available.

By a five to three vote, the Supreme Court reversed the Tennessee court and upheld the statute.[264] A plurality opinion, written by Justice Blackmun and joined by Chief Justice Rehnquist and Justices White and Kennedy, applied strict scrutiny and found that although the Tennessee statute was a content-based restriction on political speech in a public forum, the regulation was necessary to achieve "obviously" compelling interests asserted by the State.[265] Faced with reconciling two First Amendment-related values, the right to vote and the right to engage in political speech, the plurality concluded that regulation of the premises inside and outside the

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[261] 112 S. Ct. 1846 (1992).

[262] *Id.* at 1848. Specifically, § 2-7-111(b) states:

> Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited.

TENN. CODE ANN. § 2-7-111(b) (Supp. 1991).

[263] *Burson*, 112 S. Ct. at 1847.

[264] Justice Thomas took no part in the opinion. *Id.* at 1858.

[265] *Id.* at 1851.

polling place was necessary to preserve the right of citizens to vote freely in an election conducted with integrity and reliability.[266] The plurality pointed to the history of election reform and the need to combat bribery and intimidation as demonstrating the necessity of restricted areas around polling places.[267] According to the plurality, the fact that all fifty states limit access to areas in or around polling places confirmed the necessity for some restricted zone to prevent voter intimidation and fraud.[268]

The plurality rejected the contention that Tennessee could achieve the same result with laws making it a misdemeanor to interfere with an election or to use violence or intimidation to prevent voting.[269] Such laws, the plurality stated, fall short because they "deal with only the most blatant and specific attempts" to interfere with elections.[270] Furthermore, because law enforcement officers are barred from the vicinity of the polling place in order to avoid any appearance of coercion in the political process, some such attempts at interference would go unnoticed.[271] As a result, the plurality explained, the failure of the Tennessee legislature to attempt to further the States' interests in these ways did not render the statute fatally overinclusive.[272]

The plurality also rejected the argument that because the statute failed to prohibit other types of speech, such as charitable and commercial solicitation, it was underinclusive and should be struck down.[273] Noting that states enact laws to address problems they are faced with, the plurality maintained that there was no evidence that political candidates use either charitable or commercial speech as a means of engaging in electoral abuses.[274] In the absence of such evidence, "[t]he First Amendment does not require States to regulate

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[266] *Id.* at 1852, 1858.

[267] *Id.* at 1852, 1853.

[268] *Id.* at 1855.

[269] *Burson*, 112 S. Ct. at 1855.

[270] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 28 (1976) (existence of bribery statute does not curb necessity for limits on contributions to political campaigns)).

[271] *Burson*, 112 S. Ct. at 1855.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 1856.

for problems that do not exist."[275]

Acknowledging that the real issue involved in ascertaining the constitutionality of the law was how large a restricted zone would be permissible or sufficiently tailored, the plurality addressed whether the statute was sufficiently narrowly drawn to promote the State's compelling interest in guarding the right to vote.[276] The plurality cited *Munro v. Socialist Workers Party*[277] to support the proposition that when the government has a compelling interest in securing the right to vote freely and effectively, proof that a given regulation is perfectly tailored to achieve the asserted State's interest is not required.[278] Instead, the plurality suggested, states should be allowed to remedy potential problems in the electoral process "provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights."[279] Stating that the size of the boundary is a difference in degree, not a less restrictive alternative in kind, the plurality concluded that the "minor" geographic limitation dictated by the law did not constitute a significant impingement.[280]

At some point, the plurality conceded, restrictions on campaign activity that takes place "at some measurable distance from the polls" would be unconstitutionally cumbersome and would be struck down.[281] The plurality refused to articulate a specific test that would clearly delineate the line between constitutional and unconstitutional election law restrictions, however, sufficing it to say that Tennessee was on the constitutional side of the line in establishing a 100-foot boundary.[282]

Justice Kennedy joined the plurality opinion, and also wrote a concurring opinion in which he reiterated his concern expressed in *Simon & Schuster, Inc. v. Members of the New York State Crime*

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[275] *Id.*

[276] *Id.*

[277] 479 U.S. 189 (1986) (upholding statute burdening minority party candidates' First Amendment rights based on state's interest in restricting access to general ballot).

[278] *Burson*, 112 S. Ct. at 1856 (citing *Munro*, 479 U.S. at 195).

[279] *Burson*, 112 S. Ct. at 1857 (quoting *Munro*, 479 U.S. at 195-96).

[280] *Burson*, 112 S. Ct. at 1857 (citing Buckley v. Valeo, 424 U.S. 1, 30 (1976)).

[281] *Burson*, 112 S. Ct. at 1857.

[282] *Id.*

Victims Bd.[283] that the "accidental" adoption by the Court of the compelling state interest test may encourage state attempts to suppress speech on the basis of its content.[284] When courts are faced with possible content-based distinctions not obvious from the face of the statute, however, Justice Kennedy explained that the compelling interest test may be helpful in sorting out which are content-based regulations and which are not.[285] In such cases, the government has an opportunity to offer a justification for restricting speech unrelated to the suppression of speech.[286] According to Justice Kennedy, the compelling interest test is useful in determining whether the asserted state interest was truly unrelated to the suppression of legitimate speech.[287] Justice Kennedy maintained that the plurality in *Burson* properly used the compelling interest test for such a purpose.[288] The restriction the Tennessee statute imposed on speech was justified, according to Justice Kennedy, because it safeguards another constitutional right, the right to vote.[289] As a result, Justice Kennedy reasoned, the restriction did not pose a threat to core First Amendment values.[290]

Justice Scalia, although agreeing with the plurality that the Tennessee regulation was constitutional, authored a separate concurrence in which he disagreed with the plurality concerning its characterization of the street and sidewalks around polling places as a traditional public forum.[291] Although acknowledging the regulation was content-based, Justice Scalia viewed the law as a reasonable viewpoint-neutral regulation of a non-public forum and therefore constitutional.[292] According to Justice Scalia, the widespread and historic presence of statutes regulating activities in and around polling places negates the contention that these areas, including even the

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[283] 112 S. Ct. 501, 512 (1991) (Kennedy, J., concurring).

[284] *Burson*, 112 S. Ct. at 1858 (Kennedy, J., concurring).

[285] *Id.*

[286] *Id.* at 1859 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[287] *Burson*, 112 S. Ct. at 1859.

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.* (Scalia, J., concurring).

[292] *Id.*

public streets and sidewalks near them, are "traditional public forums."[293] Since the plurality found that the law survived strict scrutiny, Justice Scalia found it to be at least reasonable and therefore constitutional.[294]

Justice Stevens wrote a dissenting opinion in *Burson*, joined by Justices O'Connor and Souter.[295] The dissent agreed with the plurality that strict scrutiny was appropriate given that the statute was a content based prohibition on political expression.[296] However, the dissent disputed the plurality's conclusion that the statute was narrowly tailored or necessary to achieve the State's compelling interest in orderly access to the polls, pointing out that many states had much smaller anti-electioneering zones and that Tennessee's restricted an area of at least 30,000 feet around each polling place.[297] Moreover, the dissent concluded the statute was not narrowly tailored because it prohibited activity that would not necessarily constrain voting, such as the display of bumper stickers on cars and campaign buttons people might wear.[298]

The dissent maintained that the plurality's reliance on tradition and historical necessity was "deeply flawed."[299] Indeed, as the dissent pointed out, the Supreme Court had previously ruled unconstitutional both poll taxes and residency requirements with respect to voting, despite longstanding traditions in favor of such practices.[300] Although the plurality exempted Tennessee from

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[293] *Burson*, 112 S. Ct. at 1859 (Scalia, J., concurring).

[294] *Id.* at 1860-61. Not one Justice agreed with Justice Scalia's opinion, which would have substantially altered basic First Amendment principles and effectively allowed the government to define even a traditional public forum out of existence by pervasively and comprehensively regulating and restricting it.

[295] *Burson*, 112 S. Ct. at 1861 (Stevens, J., dissenting).

[296] *Id.*

[297] *Id.* As the dissent remarked, "[e]ven under the most sanguine scenario of participatory democracy, it is difficult to imagine voter turnout so complete as to require the clearing of hundreds of thousands of square feet simply to ensure that the path to the polling-place remains open . . . ." *Id.*

[298] *Id.* at 1862.

[299] *Id.*

[300] *Id.* *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating Tennessee's one year residency requirement); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 684 (1966) (declaring Virginia poll tax unconstitutional). The plurality in *Burson* argued that the cases cited by the dissent were distinguishable because there was no "rational

producing factual findings as to the present need for such a restriction, the dissent pointed to numerous examples of courts that have made such findings and have, without exception, found similarly broad campaign-free zones to be unwarranted.[301]

The dissent in *Burson* further explained that the statute selectively discriminated against certain kinds of campaign speech which could not be justified by reference to the asserted State interest in protecting orderly access to the polls.[302] When, as is the case here, the asserted State interest is unrelated to the State's content based distinctions between types of speech, the dissent maintained, the Court should reject the asserted state interest.[303]

Finally, the dissent questioned the plurality's assertion that it properly applied strict scrutiny to determine the constitutionality of the Tennessee statute.[304] First, the dissent pointed to the plurality's substitution of tradition for necessity in its analysis.[305] Second, the dissent contended the extension of the holding in *Munro* was misplaced given the assumption made by the plurality that campaign free zones do "not significantly impinge on constitutionally protected

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connection" between the declared interest and the rules declared unconstitutional. *Burson*, 112 S. Ct. at 1856 n.10 (quoting *Harper*, 383 U.S. at 666 ("voter qualifications have no relation to wealth nor to paying or not paying this or any other tax")).

[301] *Burson*, 112 S. Ct. at 1863-64 (Stevens, J., dissenting). *See, e.g.*, Florida Comm. for Liability Reform v. McMillan, 628 F. Supp. 1536, 1541-42 (M.D. Fla. 1988) (court granted injunction to organization seeking to enjoin enforcement of statute prohibiting solicitation within 150 feet of polling place); Clean-Up '84 v. Heinrich, 582 F. Supp. 1511 (11th Cir. 1985) (court enjoined enforcement of statute prohibiting any person from soliciting or attempting to solicit signatures on any petition within 100 yards of polling place on election day).

[302] *Burson*, 112 S. Ct. at 1863-64 (Stevens, J., dissenting). For example, the dissent pointed out that § 2-7-111(b) does not prohibit exit polling, arguably an activity with great potential to interfere with orderly access to the polls. In addition, the regulation inherently penalizes certain specific types of candidates. Candidates who have fewer resources and those campaigning for lower visibility offices benefit substantially from last-minute campaigning near the polling place. *Id.* at 1864. The dissent maintained that the plurality failed to inquire whether or not such discrimination was related to any purported state interest. *Id.*

[303] *Id.* at 1865 (citing Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501, 510 (1991)).

[304] *Burson*, 112 S. Ct. at 1865 (Stevens, J., dissenting).

[305] *Id.*

rights."[306] Third, the dissent argued that in upholding the statute because "there is simply no evidence that commercial or charitable solicitation outside the polling place poses the same potential dangers as campaigning outside the polling place," the plurality shifted the burden of proving the necessity of discrimination from the State to the plaintiff.[307] The dissent explained that this contradicted the fundamental principle of strict scrutiny; that the burden of providing a justification for content discrimination is on the State.[308]

Analysis of the conflicting opinions in *Burson* indicates that the dissent, along with the Tennessee Supreme Court, had the better of the argument. The plurality's relatively lax approach to strict scrutiny conflicts with established Court precedent, including even decisions this term in *Norman v. Reed*[309] and *R.A.V. v. City of St. Paul.*[310] Perhaps most telling is the criticism that the plurality failed to explain how to draw the line between election day restrictions that are constitutional and those that are not. As the dissent pointed out, there is an important difference between the restricted zone statute the plurality upheld in *Burson* and the complete ban on election-day editorial endorsements the Court struck down as unconstitutional in *Mills.*[311] Yet, if a 100-foot political speech-free zone is permissible in *Burson*, why not a 200, 300, or 1000-foot zone? The plurality offered no principled basis to distinguish, strongly suggesting the weakness of the underlying analysis. Given the core First Amendment values at issue in *Burson*, it is unfortunate that the plurality neglected to outline a framework for determining when states have crossed the line into impermissible regulation of political speech.

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[306] *Id.* (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986)).

[307] *Burson*, 112 S. Ct. at 1866 (Stevens, J., dissenting).

[308] *Id.*

[309] 112 S. Ct. 698 (1992). *See* discussion *supra* pp. 35-39.

[310] *See* discussion *supra* pp. 10-20.

[311] *Burson*, 112 S. Ct. at 1866 (citing Mills v. Alabama, 384 U.S. 214 (1966)).

3. *Burdick v. Takushi*

The third case this term in which the Supreme Court considered an arguably unconstitutional election law is *Burdick v. Takushi*.[312] In *Burdick*, the Court upheld Hawaii's prohibition on write-in voting.[313] Alan Burdick was a registered voter in Hawaii who wished to vote in the primary and general elections for a person whose name was not on the ballot.[314] Upon learning that Hawaii law prohibited write-in voting, Burdick filed suit, claiming that the ban violated his rights of expression and association under the First and Fourteenth Amendments.[315] The district court ultimately granted Burdick's motion for summary judgment and injunctive relief.[316] The Court of Appeals reversed,[317] holding that in the context of Hawaii's comprehensive election scheme, the ban on write-in votes did not unconstitutionally burden the right to vote.[318]

By a six to three majority, the Supreme Court affirmed the judgment of the Court of Appeals.[319] Justice White wrote the majority opinion, holding that Hawaii's ban on write-in voting did not unconstitutionally infringe on voters' First Amendment rights.[320] Although acknowledging the significance of the right to vote,[321] the majority stated that the right to vote and the right to associate for political purposes through the ballot are subject to "reasonable

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[312] 112 S. Ct. 2059 (1992).

[313] *Id.* at 2067-68.

[314] *Id.* at 2061.

[315] *Id.*

[316] Burdick v. Takushi, 737 F. Supp. 582 (Haw. 1990), *rev'd*, 937 F.2d 415 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992).

[317] Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991), *aff'd*, 112 S. Ct. 2059 (1992).

[318] *Burdick*, 937 F.2d. at 422.

[319] *Burdick*, 112 S. Ct. at 2061.

[320] *Id.* at 2067-68.

[321] *Id.* at 2067. *See* Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (holding that Illinois election code requiring independent candidates and new parties to obtain more than 25,000 signatures violated Equal Protection Clause).

nondiscriminatory restrictions."[322] The majority explained that in order to preserve the integrity, fairness, and efficiency of elections, the government must remain free to structure and regulate the democratic process.[323] Therefore, to subject all election laws to strict scrutiny, the majority reasoned, would substantially impede government efforts to protect the electoral process.[324] The majority stated that in assessing the constitutionality of a challenged regulation, a court must balance

> 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'[325]

An election law that severely restricts voters' rights under the First and Fourteenth Amendments, the majority held, must be "narrowly drawn to advance a state interest of compelling importance."[326] However, an election law that imposes only "reasonable, nondiscriminatory restrictions" upon citizens' First and Fourteenth Amendment rights, the majority concluded, must be justified with reference to the State's "important regulatory interests."[327]

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[322] *Burdick*, 112 S. Ct. at 2063-64. *See* Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986) (holding that Illinois ballot access law did not unconstitutionally burden minority party candidates' rights); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (holding that Ohio's early filing deadline for independent candidates unconstitutionally burdened First Amendment rights of independent candidates).

[323] *Burdick*, 112 S. Ct. at 2063. *See* Storer v. Brown, 415 U.S. 724, 730 (1974) (upholding provision of California Election Code forbidding ballot position to independent candidates).

[324] *Burdick*, 112 S. Ct. at 2063. *See* Bullock v. Carter, 405 U.S. 134, 143 (1972) (holding that Texas primary election filing fee system violated Equal Protection Clause).

[325] *Burdick*, 112 S. Ct. at 2063 (quoting *Anderson*, 460 U.S. at 789).

[326] *Burdick*, 112 S. Ct. at 2063 (quoting Norman v. Reed, 112 S. Ct. 698, 705 (1992) (upholding Illinois ballot access scheme)).

[327] *Burdick*, 112 S. Ct. at 2063-64 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

The majority in *Burdick* characterized the case as a ballot access case.[328] Since Hawaii's ballot access scheme provided ample access to interested candidates, the majority determined that the ban on write-in voting did not severely restrict the First Amendment rights of voters to associate and have their candidate of choice placed on the ballot.[329] The slight burden Hawaii's ballot access system did impose on voters' freedom of choice and association, the majority maintained, was borne primarily by those citizens choosing their candidates shortly before the primary, an interest the majority noted was customarily accorded little weight.[330]

The majority in *Burdick* rejected claims that Hawaii's write-in prohibition conditioned voters' participation upon the waiver of their First Amendment right to remain free from advocating viewpoints they did not support.[331] The purpose of the election process, the majority stated, was "'to winnow out and finally reject all but the chosen candidates,'" not to furnish a forum for venting "'short-range political goals, pique, or personal quarrel[s].'"[332] The majority in *Burdick* also rejected claims that the law discriminated against citizens wishing to express a particular message through their vote, concluding that Hawaii's absolute ban on write-in votes was content neutral.[333]

In *Burdick*, the majority found that Hawaii's interest in "avoiding the possibility of unrestrained factionalism at the general election" justified the ban on write-in voting.[334] The write-in ban, the majority concluded, preserved the general election for major contested races and avoided "divisive sore loser candidacies."[335] The majority also found that Hawaii had a legitimate interest in preventing

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[328] *Burdick*, 112 S. Ct. at 2065-66.

[329] *Id.* at 2066.

[330] *Id.* at 2068 (citing Storer v. Brown, 415 U.S. 724, 736 (1974)). The cutoff date for filing nominating petitions in Hawaii was two months before the primary. HAW. REV. STAT. §§ 12-2.5 to 12-7 (1985 & Supp. 1991).

[331] *Burdick*, 112 S. Ct. at 2066.

[332] *Id.* (quoting *Storer*, 415 U.S. at 735).

[333] *Burdick*, 112 S. Ct. at 2066 (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986)).

[334] *Burdick*, 112 S. Ct. at 2066. *See Storer*, 415 U.S. at 735; *Munro*, 479 U.S. at 196, 199.

[335] *Burdick*, 112 S. Ct. at 2066.

"party raiding."[336] The majority pointed out that Hawaii law required party candidates to be "members [ ] of the party"[337] and also prohibited candidates from filing "nomination papers both as a party candidate and as a non-partisan candidate."[338] Absent the write-in ban, the majority explained that Hawaii's election laws could easily be frustrated at the primary by citizens launching a write-in campaign for a person who had not filed in time or who had never intended to run for election.[339] Hawaii had a legitimate interest in preventing these electoral abuses, the majority concluded, and Hawaii's prohibition on write-in voting was a legitimate way of advancing its interests.

Not only did the majority uphold Hawaii's ban on write-in voting, it also adopted a presumption that a state's prohibition on write-in voting would be valid if its ballot access laws imposed only reasonable burdens on First and Fourteenth Amendment rights.[340] The majority reasoned that in such cases, any burden on voter's free choice would be minimal, and would be offset by the States' interests supporting the ballot access scheme.[341] In such instances, the majority maintained, objections to write-in bans were merely demands that the state record individual protests to the choices presented on the ballot.[342] The majority in *Burdick* declined to attribute such a generalized expressive function to the ballot, stating that to do so would jeopardize states' ability to conduct elections fairly and

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[336] *Id.* (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 219 (1986)) (holding that Connecticut closed primary law impermissibly interfered with political party's First Amendment right to define associational boundaries). The majority defined "party raiding" as "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Burdick*, 112 S. Ct. at 2066 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 n.9 (1983)).

[337] HAW. REV. STAT. § 12-3(a)(7) (1985).

[338] *Id.* § 12-3(c).

[339] *Burdick*, 112 S. Ct. at 2067. The majority also stated that the write-in ban was essential to prohibit mounting a campaign at the general election for a person who had lost in the primary or for an independent who had failed to get an adequate number of votes to make the general election ballot. *Id.*

[340] *Id.*

[341] *Id.*

[342] *Id.*

efficiently.[343]

Justices Kennedy, Blackmun, and Stevens dissented from the majority opinion in *Burdick*, disagreeing with the majority's conclusion that Hawaii's ban on write-in voting did not impose a significant burden on citizens' First Amendment right to vote for the candidates of their choice.[344] Justice Kennedy, writing for the dissent, agreed with the majority's statement of the test to apply to determine the severity with which a state election law burdens the right to vote.[345] However, the dissent pointed to the large number of blank ballots cast in uncontested races as evidence that Hawaii's prohibition on write-in voting prevented voters from casting meaningful votes.[346] The dissent noted that Hawaii's write-in prohibition created an extremely difficult situation for voters who learn disturbing information about their preferred candidates late in an election.[347] In addition, Hawaii's ballot access scheme, the dissent pointed out, magnified the injury to voters' First Amendment rights by creating impediments to third and independent party candidates wishing to appear on the ballot.[348] Based on these factors, the dissent reasoned that Hawaii's write-in ban deprived some voters of any substantial voice in selecting candidates for the entire range of offices at issue in a particular election.[349]

The dissent in *Burdick* concluded that Hawaii had failed to

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[343] *Id.*

[344] *Burdick*, 112 S. Ct. at 2068 (Kennedy, J., dissenting).

[345] *Id.* at 2069.

[346] *Id.* at 2072.

[347] *Id.* at 2068.

[348] *Id.* The dissent explained that small parties may have difficulty organizing early enough to meet Hawaii's deadline for gathering nominating signatures. Furthermore, Hawaii law provided that each voter may choose only a single ballot for all offices. Because there are not often independent candidates for all offices, the dissent argued, a voter wishing to vote for an independent candidate might forgo the opportunity to vote for several offices. *Id.* at 2068-69.

[349] *Id.* at 2068. The dissent in *Burdick* rejected the majority's presumption concerning the permissibility of a state's write-in prohibition. Instead, the dissent argued that courts must regard the existence or non-existence of write-in bans as a consideration in determining the constitutionality of a state's ballot access scheme. The majority's reasoning, the dissent maintained, was circular, and excused the state from having to adequately justify its write-in ban. *Id.* at 2071.

justify the prohibition on write-in voting under any level of scrutiny.[350] The State, the dissent noted, had an interest in preserving the integrity of party primaries by preventing sore loser candidacies during the general election.[351] However, the dissent maintained that the write-in ban was an overinclusive means of addressing the problem.[352] The ban on write-in votes, the dissent pointed out, prohibited legitimate candidacies as well as undesirable ones.[353] In addition, because the State's interest in preventing party raiding arose out of its chosen open primary system, the dissent asserted it should not serve to justify the write-in ban at primary elections.[354] Furthermore, the asserted State interest in advancing its policy of allowing unopposed victors in some primaries to obtain office without having to participate in the general election, the dissent argued, created an enhanced need for write-in voting at the primary.[355] Finally, the State's asserted need to foster an informed electorate was undermined, the dissent pointed out, by the fact that voters who write in candidates are likely to be the most informed and politically active citizens in the electorate.[356]

The Court's decision in *Burdick* neglects the realities that small parties and independent candidates face in achieving access to the ballot. The Court has previously used the Equal Protection Clause to invalidate state statutes that disproportionately affect independent candidates and small parties.[357] A similar rationale could have applied in *Burdick*. In addition, the Court's adoption of a presumption regarding prohibitions on write-in voting, as the dissent pointed out, enables courts to ignore an essential element in their calculation of whether or not a state's ballot access scheme imposes unreasonable restrictions on voter's First Amendment rights.

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[350] *Burdick*, 112 S. Ct. at 2071 (Kennedy, J., dissenting).

[351] *Id.*

[352] *Id.*

[353] *Id.*

[354] *Id.* at 2071-72.

[355] *Id.* at 2071.

[356] *Id.* at 2072.

[357] *See* Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979); Bullock v. Carter, 405 U.S. 134, 149 (1972); Williams v. Rhodes, 393 U.S. 23, 34 (1968).

Although the Court noted that it was not endorsing write-in bans,[358] states that do implement them are now more able to do so without adequate justification.

II. Freedom of Association -- Dawson v. Delaware

The Supreme Court considered one case this term concerning the First Amendment freedom of association. *Dawson v. Delaware*[359] concerned the question whether the admission of evidence against a criminal defendant concerning his membership in a gang violated his freedom of association.[360] At the penalty hearing of Davis Dawson, who was convicted of first degree murder, the prosecution read the following stipulation to the jury: "The Aryan Brotherhood refers to a white racist prison gang that began . . . in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many other state prisons including Delaware."[361] The prosecution also introduced evidence that Dawson had the words "Aryan Brotherhood" tattooed on his hand.[362] Based in part on this evidence, the jury made a binding recommendation that Dawson be sentenced to death. On appeal, the Delaware Supreme Court affirmed the conviction and the death penalty sentence.[363]

By an eight to one majority, the Supreme Court vacated the judgment below and remanded the case in order to decide whether the wrongful admission of the Aryan Brotherhood evidence was harmless error.[364] Chief Justice Rehnquist, writing for the majority, held that it was constitutional error for the trial court to have admitted

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[358] *Burdick*, 112 S. Ct. at 2067 n.11.

[359] 112 S. Ct. 1093 (1992).

[360] *Id.* at 1095.

[361] *Id.* at 1096 (quoting trial app. at 132).

[362] *Burdick*, 112 S. Ct. at 1096.

[363] Dawson v. Delaware, 581 A.2d 1078, 1109 (Del. 1990), *rev'd*, 112 S. Ct. 1093 (1992).

[364] *Dawson*, 112 S. Ct. at 1099. *See* Clemens v. Mississippi, 494 U.S. 738, 750 (1990) (upholding federal constitutional authority of state appellate court to affirm death sentence based in part on aggravating circumstances by harmless-error rule).

evidence of Dawson's membership in the Aryan Brotherhood.[365] In reaching its conclusion, the majority rejected Dawson's broad assertion that the First Amendment erected a per se barrier to the admissibility concerning one's beliefs and associations at a capital sentencing hearing.[366] Nevertheless, the Court agreed that the admission of the evidence in this case violated the First Amendment.[367]

Noting that the stipulation lacked specificity about the Delaware "chapter" of the Aryan Brotherhood, the majority reasoned that the jury was left to infer that the beliefs of the Delaware chapter were identical to the beliefs of the California chapter.[368] Additionally, the majority explained that even if the Delaware group to which Dawson allegedly belonged was racist, those beliefs were unrelated to the facts of Dawson's case.[369] Since Dawson's victim was white, the majority asserted, there were no elements of racial hatred involved in the killing.[370] Therefore, the majority concluded, the Aryan Brotherhood evidence was in no way relevant to Dawson's sentencing proceeding.[371]

The Court pointed out that the prosecution in *Dawson* failed to prove that the Aryan Brotherhood had committed or endorsed any unlawful or violent acts.[372] If the prosecution had offered such proof, the majority suggested, Dawson's membership in the Aryan Brotherhood might have been relevant to show he was a future danger to society.[373] The majority concluded that absent proof of the specific unlawful acts committed by the Aryan Brotherhood, the jury was left with nothing more than evidence concerning the abstract

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[365] *Dawson*, 112 S. Ct. at 1096.

[366] *Id.* at 1097. *See* United States v. Abel, 469 U.S. 45 (1984) (upholding admission of evidence of defense witness' membership in organization).

[367] *Dawson*, 112 S. Ct. at 1097.

[368] *Id.* at 1098.

[369] *Id.*

[370] *Id.*

[371] *Id.* The majority distinguished the evidence presented in *Dawson* from the evidence in Barclay v. Florida, 463 U.S. 939 (1983), in which evidence of the defendant's membership in the Black Liberation Army was related to the murder of a white hitchhiker. *See Barclay*, 463 U.S. at 942-44.

[372] *Dawson*, 112 S. Ct. at 1098.

[373] *Id.*

beliefs of Dawson or the Delaware chapter.[374] Regardless of whether the proof was characterized as evidence of Dawson's character, rebuttal of Dawson's evidence concerning his character, or in some other manner, the Court ruled that "Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs."[375]

Justice Blackmun wrote a brief concurring opinion in *Dawson*, maintaining that the Court's decision did not mandate the application of the harmless-error review on remand.[376] Justice Blackmun pointed to numerous cases in which the Court had declined to apply the harmless-error test to constitutional errors.[377] In *Dawson*, Justice Blackmun argued, "because of the potential chilling effect that consideration of First Amendment activity at sentencing might have, there is substantial argument that harmless-error analysis is not appropriate for the type of error before us today."[378]

Justice Thomas wrote a dissenting opinion in *Dawson* in which he disagreed with the majority's conclusion that the Aryan Brotherhood evidence had "no relevance" to the issues being decided at the sentencing proceeding.[379] Justice Thomas argued that under Delaware law, evidence of Dawson's gang membership was relevant character evidence in determining whether he should receive the death

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[374] *Id.*

[375] *Id.* (explaining that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable") (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[376] *Dawson*, 112 S. Ct. at 1099 (Blackmun, J., concurring).

[377] *Id.* at 1099-1100. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 100 (1986) (Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of their race or on assumption that black jurors will be unable to impartially consider state's case against black defendant); Vasquez v. Hillery, 474 U.S. 254, 261-62 (1986) (finding it is a denial of equal protection to exclude blacks from a grand jury that indicted black defendant); Waller v. Georgia, 467 U.S. 39, 49-50 (1984) (closure of entire suppression hearing plainly unjustified and violated defendant's 6th Amendment public trial guarantee); Turney v. Ohio, 273 U.S. 510, 535 (1927) (denial of 14th Amendment Due Process to subject liberty and property of defendant to judgment of trial judge who has direct interest in reaching conclusion against him).

[378] *Dawson*, 112 S. Ct. at 1100 (Blackmun, J., concurring).

[379] *Id.* (Thomas, J., dissenting).

penalty.[380] This evidence could be used to rebut evidence that Dawson had presented regarding his good character and could be used to demonstrate his possible future danger to society.[381] He also asserted that the majority's ruling improperly made it difficult for prosecutors, but not defendants, to introduce character evidence, and that the majority failed to explain why the courts may consider evidence of some First Amendment protected activities and not others.[382]

The Supreme Court in *Dawson* left open the admissibility of some evidence in criminal penalty proceedings concerning an individual's beliefs and associations. As the dissent pointed out, however, the Court failed to provide clear guidelines as to when such evidence is relevant. The Court clearly held that the Aryan Brotherhood evidence in *Dawson* lacked any relevance to the sentencing proceeding. However, particularly given the dearth of evidence presented and the lack of connection between the evidence of Dawson's membership in the Aryan Brotherhood and the crime, *Dawson* fails to provide clear guidance as to when evidence of activities protected under the First Amendment is admissible in a criminal case.

III. The Establishment Clause -- Lee v. Weisman

The sole Establishment Clause case rendered this term was *Lee v. Weisman*.[383] In *Weisman*, a closely divided Supreme Court ruled that the Establishment Clause forbids officially sanctioned prayer at public school graduation ceremonies.[384] For Deborah Weisman's middle school graduation, the principal, following Providence, Rhode Island's School Committee policy, invited a rabbi

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[380] *Id.* Delaware law states that after a judge or jury finds a statutory aggravating factor, it must consider "all relevant evidence in aggravation or mitigation" relating to either the crime or the "character and propensities" of the defendant. DEL. CODE ANN. tit. 11, § 4209(d)(1)(a-b) (1987).

[381] *Dawson*, 112 S. Ct. at 1102, 1104 (Thomas, J., dissenting).

[382] *Id.* at 1102.

[383] 112 S. Ct. 2649 (1992).

[384] *Id.* at 2661.

to deliver prayers at the ceremony.[385] Prior to the ceremony the principal provided the rabbi with guidelines regarding prayers at civic occasions and advised the rabbi that the invocation and benediction should be non-sectarian.[386] The rabbi accepted the invitation and delivered the prayers.[387] Weisman's father sought an injunction barring Providence public school officials from inviting members of the clergy to give similar invocations and benedictions at future graduation ceremonies.[388] The District Court granted Weisman's injunction and held that under the three-part test outlined in *Lemon v. Kurtzman*,[389] the practice violated the Establishment Clause of the First Amendment.[390] The Court of Appeals affirmed the lower court's ruling.[391]

The Supreme Court, by a five to four majority, affirmed the judgment of the Court of Appeals declaring the school system's policy unconstitutional.[392] Justice Kennedy, joined by Justices Blackmun, Stevens, O'Connor, and Souter, wrote the opinion of the Court holding that the State's practice conflicted with well-established principles governing prayer in primary and secondary schools.[393] Accordingly, Justice Kennedy wrote, the majority declined the "invitation" by the Bush Justice Department and the petitioners to reconsider the general constitutional guidelines set forth in *Lemon v. Kurtzman* regulating the degree of allowable government

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[385] *Id.* at 2652.

[386] *Id.* The guidelines were originally drafted by the National Conference of Christians and Jews. *Id.*

[387] *Id.*

[388] *Id.* at 2654.

[389] 403 U.S. 602 (1971).

[390] Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992). The three-part Establishment Clause test set forth in *Lemon v. Kurtzman* mandates that for a state practice to satisfy the Establishment Clause the practice must (1) reflect a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; (3) not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. The District Court determined that Providence's practice violated the second prong of the *Lemon* test. *Weisman*, 728 F. Supp. at 71.

[391] Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992).

[392] *Weisman*, 112 S. Ct. at 2649.

[393] *Id.*

accommodation of religious practices.[394] Given the direct involvement of the State in the planning of the prayer and the effectively obligatory nature of the ceremony, the Court concluded that the school's practice violated fundamental Establishment Clause principles.[395] Since the principal in *Weisman* decided a prayer would be given, chose and invited the rabbi, and guided and advised the rabbi on the content and the nature of the prayer, Justice Kennedy explained, the school's involvement in the religious activity was "pervasive," and created an unconstitutional state sponsored religious activity in school.[396]

Prayer in schools, the majority reasoned, is particularly troubling given the high risk of subtle coercion of school age children.[397] The public pressure and peer pressure created by public school officials' control of graduation ceremonies and the susceptibility of adolescents to conform, Justice Kennedy maintained, combined to create an unacceptable risk that dissenting students were pressured to participate in the exercise or at a minimum perceived the

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[394] *Id.* at 2655.

[395] *Id.*

[396] *Id.* The majority stated that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a state religion or religious faith or tends to do so.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (holding that city's inclusion of nativity scene in its Christmas display did not violate Establishment Clause)). *See also* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 591 (1989) (holding that creche in county courthouse violated Establishment Clause although Chanukah menorah and Christmas tree outside city and county building did not unconstitutionally endorse Christian and Jewish faiths); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (holding New Jersey statute providing for the transportation of pupils to public and parochial schools constitutional).

[397] *Weisman*, 112 S. Ct. at 2649. *See* Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring) (upholding as constitutional Equal Access Act requiring schools to give the same access to student religious groups as non-religious groups); Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (holding that Louisiana statute requiring the teaching of Creation-Science and Evolution-Science lacked secular purpose and violated Establishment Clause); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring) (holding that statutes authorizing readings from Bible at opening of school exercises violated Establishment Clause).

State's position as one enforcing a particular religion.[398] The majority distinguished *Weisman* from *Marsh v. Chambers*,[399] which upheld public prayer at the opening of a state legislative session, noting that *Marsh* involved a situation in which "adults are free to enter and leave . . . ."[400]

The majority in *Weisman* rejected the contention that the option of students not to attend the graduation ceremony obviated any Establishment Clause problem.[401] "Law reaches past formalism," Justice Kennedy stated, and "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."[402] The First Amendment, the majority noted, guarantees that citizens not be forced to forfeit rights as the price of resisting compliance with state-sponsored religious practice.[403] "[T]he fact that attendance at the graduation ceremonies is voluntary in a legal sense," the majority concluded, "does not save the religious exercise."[404]

Justice Kennedy was careful to note that the holding in *Weisman* was limited to the circumstances of the case.[405] Attempts to eradicate religion from all aspects of public life, he explained, might well be inconsistent with the Constitution.[406] In fact, Justice Kennedy suggested that there would be instances in which religion could properly be involved in public schools and at graduation

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[398] *Weisman*, 112 S. Ct. at 2658. The Court noted, for example, that standing in respectful silence carries with it the unacceptable risk that the dissenter will be misperceived as having participated in the prayer and therefore is an inadequate means of expressing his or her objections. *Id.*

[399] 463 U.S. 783 (1983).

[400] *Weisman*, 112 S. Ct. at 2660.

[401] *Id.* at 2559.

[402] *Id.*

[403] *Id.* at 2660.

[404] *Id.* *See* Engel v. Vitale, 370 U.S. 421, 430 (1962) (holding that regardless of parents' ability to excuse their children from daily required prayer in school, practice violated Establishment Clause). The majority further noted, based on *Engel* and other cases, that the non-sectarian nature of the prayer mitigated neither the violation of dissenters' rights nor the violation of the First Amendment prohibition against schools engaging in the establishment of religion. *Weisman*, 112 S. Ct. at 2661.

[405] *Weisman*, 112 S. Ct. at 2661.

[406] *Id.* *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

ceremonies.[407] However, the majority held that an explicitly religious exercise may not be conducted at a public school graduation ceremony where "young graduates who object are induced to conform" and the school seeks to "persuade or compel a student to participate."[408]

Justice Blackmun wrote a concurring opinion in *Weisman* which Justices Stevens and O'Connor joined.[409] Although agreeing with the Court's holding and Justice Kennedy's opinion, Justice Blackmun went further to maintain specifically, in contrast to the position taken by the Bush Justice Department and the dissent, that evidence of government coercion was not necessary to prove an Establishment Clause violation.[410] Because even subtle pressure reduces the ability of individuals to choose their beliefs, Justice Blackmun explained, true freedom of religion entails more than freedom from coercion.[411] The fact that the Providence school system engaged in and endorsed religious activity, Justice Blackmun stated, was sufficient to prove the practice unconstitutional.[412] The risk of excluding some individuals, the need to protect democracy, and the need for religious freedom, Justice Blackmun reasoned, mandate a prohibition against government endorsement, sponsorship, and involvement in religion, in accordance with prior precedent.[413]

Justice Souter, also joined by Justices Stevens and O'Connor, authored another concurring opinion in *Weisman*, in which he reaffirmed the principle that the Establishment Clause prohibits

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[407] *Weisman*, 112 S. Ct. at 2661. Specifically, Justice Kennedy referred to Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990), which upheld extracurricular religious meetings at public schools.

[408] *Weisman*, 112 S. Ct. at 2661.

[409] *Id.* (Blackmun, J., concurring).

[410] *Id.* at 2664. *See* Wallace v. Jaffree, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring) (Alabama statute authorizing daily periods of silence in public schools lacked secular purpose and violated Establishment Clause); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 786 (1973) (holding that New York statute authorizing aid to non-public schools and income tax benefits to parents of children attending non-public schools violated Establishment Clause).

[411] *Weisman*, 112 S. Ct. at 2665 (Blackmun, J., concurring).

[412] *Id.* at 2664.

[413] *Id.* at 2666-67. *See, e.g.*, Zorach v. Clauson, 342 U.S. 306, 313 (1952) (upholding New York City statute providing for the release of public school pupils from school attendance to attend religious classes).

practices that favor religion over non-religion even where no specific sectarian beliefs or practices are preferred.[414] The Supreme Court has consistently held that the Establishment Clause forbids practices that favor religion generally,[415] and Justice Souter maintained that absent a compelling reason the Court should not abandon such precedent.[416] Justice Souter pointed to the history of the textual development of the Establishment Clause as additional evidence supporting the conclusion that it prohibits state support of religion in general.[417] In addition, Justice Souter suggested, allowing governmental favoritism of religion generally would inappropriately require courts to engage in comparisons of religious practices to determine which were sufficiently non-sectarian to be constitutional.[418]

Justice Souter also reiterated Justice Blackmun's criticism of the "coercion" theory of the Establishment Clause.[419] Justice Souter pointed to several cases in which the Court had invalidated State laws and practices endorsing religion where no coercion was involved,[420] and explained that an examination of constitutional history simply did not reveal the kind of inconsistency with settled law to warrant a reconsideration of the Court's Establishment Clause jurisprudence.[421] In addition, Justice Souter observed that since the Free Exercise Clause already prohibits coercion to participate in religious activity, adopting a coercion test would render the Establishment Clause a

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[414] *Weisman*, 112 S. Ct. at 2667 (Souter, J., concurring) (citing Everson v. Ewing Bd. of Educ., 330 U.S. 1, 15 (1947)).

[415] *Weisman*, 112 S. Ct. at 2667 (Souter, J., concurring). *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (holding unconstitutional state tax exemption benefitting only religious periodicals).

[416] *Weisman*, 112 S. Ct. at 2668 (Souter, J., concurring).

[417] *Id.* at 2670.

[418] *Id.* at 2671.

[419] *Id.*

[420] *Id.* at 2671-72 (citing Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 589-94, 598-602 (1989); Wallace v. Jaffree, 472 U.S. 38, 61, 67-84 (1985); Epperson v. Arkansas, 393 U.S. 97 (1968)).

[421] *Weisman*, 112 S. Ct. at 2676 (Souter, J., concurring).

duplicate and a "virtual nullity."[422]

Justice Scalia vigorously dissented in *Weisman*, joined by Chief Justice Rehnquist and Justices White and Thomas.[423] Justice Scalia argued that the meaning of the Establishment Clause should be determined by reference to the position of prayer in history.[424] Since prayer has traditionally figured prominently in government ceremonies as well as in public-school graduation ceremonies, Justice Scalia maintained, the prayer at issue in *Weisman* did not violate the Establishment Clause.[425]

Justice Scalia disagreed with the majority's conclusion that students' attendance and participation at the graduation ceremony were in effect obligatory, suggesting that students who objected to the prayer could sit in silence.[426] Moreover, according to Justice Scalia, the government's interest in fostering respect for religion generally outweighed any individual interest in avoiding the false appearance of having participated in the prayer.[427]

Justice Scalia vigorously argued that coercion was necessary to invalidate a practice under the Establishment Clause, and questioned the legitimacy of the majority's reliance on "peer-pressure" or "psychological coercion."[428] Instead, Justice Scalia asserted that the Establishment Clause protects only against coercion of religious activity or support for religion that was coerced by "force

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[422] *Id.* at 2673. Justice Souter recognized that the State was free to "accommodate" the free exercise of religion "by relieving people from generally applicable rules that interfere with their religious callings." *Id.* at 2676. However, the accommodation, Justice Souter noted, must "lift a discernable burden on the free exercise of religion." *Id.* at 2677. In *Weisman*, Justice Souter argued, students could not realistically complain that the exclusion of prayer from their graduation ceremony "burdened" their free exercise of religion. *Id.*

[423] *Weisman*, 112 S. Ct. at 2678 (Scalia, J., dissenting).

[424] *Id.* at 2678-79 (citing Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in part and dissenting in part)).

[425] *Weisman*, 112 S. Ct. at 2679 (Scalia, J., dissenting). Much of Justice Scalia's historical analysis was specifically discussed and refuted in Justice Souter's concurring opinion. *See id.* at 2667-78 *passim* (Souter, J., concurring).

[426] *Id.* at 2681 (Scalia, J., dissenting).

[427] *Id.* at 2682. Justice Scalia cited no previous Court precedent for the proposition that the state has a legitimate government interest in fostering respect for religion that outweighs the individual interest in religious freedom.

[428] *Id.* at 2683-84.

of law" or "threat of penalty."[429] Since there was no evidence that students who failed to take part in the invocation or benediction would be subject to penalty or discipline, and since there was no mandatory attendance at graduation ceremonies (unlike the classrooms involved in previous school cases), Justice Scalia argued that the graduation prayers did not violate the Establishment Clause.[430]

Justice Scalia concluded by suggesting that despite the majority's explicit refusal to reconsider *Lemon v. Kurtzman*, the decision effectively produced the "interment of that case" since the majority "essentially ignored it."[431] According to Justice Scalia, however, the Court acted improperly by ruling unconstitutional a government-endorsed prayer and "the expression of gratitude to God that a majority of the community wishes to make."[432]

Many observers were encouraged, and somewhat surprised, by the fact that the majority decision in *Weisman* affirmed the importance of church-state separation in the public schools, ruled unconstitutional the practice of official graduation prayer, and declined to reconsider *Lemon*.[433] In some respects, however, *Weisman* may be the beginning, not the end, of serious questions about the future of Establishment Clause jurisprudence.

Much of the debate concerning the Establishment Clause has focused on whether government coercion to participate in religious practice is necessary to prove a constitutional violation or whether, as Justice Souter suggested, official government endorsement of religion violates the First Amendment. Resolution of this debate is far from academic; it has potentially important implications for government aid to parochial schools, municipally-sponsored creches or holiday displays, teaching evolution versus creationism in the public schools, and many other controversies. Based on *Weisman*, the Court appears divided three ways on the issue: four votes for coercion (the dissenters in *Weisman*), four votes for endorsement (the four concurring justices), and Justice Kennedy, squarely in the

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[429] *Id.* at 2683.

[430] *Weisman*, 112 S. Ct. at 2684 (Scalia, J., dissenting).

[431] *Id.* at 2685.

[432] *Id.* at 2686.

[433] *See, e.g., Justices Decline to Rewrite Church-State Separation Rules*, 20 SCH. LAW NEWS, July 3, 1992, at 1.

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Justice Kennedy's opinion includes elements of both coercion and endorsement in its analysis,[434] and clearly leaves room for a different result in a different case, particularly outside of the public schools. Indeed, Justice Scalia suggested that even graduation prayers might be acceptable to a majority of the Court if the school makes clear that no one is "compelled to join in them."[435] Although this particular suggestion may be wishful thinking, Justice Kennedy has himself criticized *Lemon* and endorsed coercion analysis in a 1989 case concerning municipal creches.[436] Particularly outside the public schools, *Lemon* and the endorsement standard may still be on very shaky ground, causing great uncertainty for the lower courts and serious potential problems for the Establishment Clause.

Interestingly, although petitions for *certiorari* were pending in several cases at the time of *Weisman* that could have resolved some of the uncertainties left after the Court's decision, the Supreme Court declined to review fully even a single one. These included decisions on such issues as municipal religious holiday displays, use of religious symbols on municipal seals, whether a student volunteer could deliver a voluntary nonsectarian prayer at a graduation, and whether a judge could open each day's court session with a prayer.[437]

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[434] *See, e.g., Weisman*, 112 S. Ct. at 2655 (noting that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religious exercise"); *id.* at 2657 (explaining that "state-sponsored and state-directed religious exercise in a public school" is improper).

[435] *Id.* at 2685 (Scalia, J., dissenting).

[436] *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 665 (1989) (Kennedy, J., concurring in part and dissenting in part).

[437] *See* Harris v. City of Zion, Ill., 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3054 (1992) (holding that religious symbols on municipal seals violates Establishment Clause); Murray v. City of Austin, Tex., 947 F.2d 147 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 3028 (1992) (upholding as constitutional city's inclusion of Christian cross in municipal insignia); N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992) (holding that state judge's practice of opening each morning's court session with a prayer violates Establishment Clause); Chabad-Lubavitch of Vt. v. City of Burlington, 936 F.2d 109 (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992) (holding that private group's display of menorah in a public park violates Establishment Clause, where displayed prominently and separately from secular exhibit, rather than placed as part of whole display); Doe v. Village of Crestwood, Ill., 917 F.2d 1476 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992) (holding that municipality's sponsorship of Roman Catholic mass

Yet four months later, at the beginning of its 1992-1993 Term, the Court agreed to review two additional cases raising church-state issues in the school setting. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*[438] concerns a school district's refusal to allow a religious group to use facilities during evening hours to show a religious film series where similar non-religious uses were permitted.[439] The issue in *Zobrest v. Catalina Foothills Sch. Dist.*[440] is whether providing a sign language interpreter to a deaf student under the federal Education of the Handicapped Act would violate the Establishment Clause where such aid is available to students attending public and private non-religious schools.[441] These cases, as well as continuing church-state controversies elsewhere, make clear that the Court will be addressing Establishment Clause issues again in the months and years to come.

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spoken in Italian as part of Italian festival violates Establishment Clause); Kuhn v. City of Rolling Meadows, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3025 (1992) (holding that religious symbols on municipal seals violates Establishment Clause); Jones v. Clear Creek Indep. Sch. Dist., 930 F.2d 416 (5th Cir. 1991), *vacated*, 112 S. Ct. 3020 (1992) (upholding as constitutional school policy allowing prayer invoking God at high school graduation ceremony, provided prayer is non-sectarian and written and delivered by student volunteer).

[438] 959 F.2d 381 (2d Cir. 1991), *cert. granted*, 61 U.S.L.W. 3256 (U.S. Oct. 5, 1992) (No. 91-2024).

[439] *Lamb's Chapel*, 959 F.2d at 383.

[440] 963 F.2d 1190 (9th Cir.), *cert. granted*, 61 U.S.L.W. 3256 (U.S. Oct. 5, 1992) (No. 92-94).

[441] *Zobrest*, 963 F.2d at 1191.